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# THE DEFENSE OF MARRIAGE ACT: A CRITICAL ANALYSIS OF ITS CONSTITUTIONALITY UNDER THE FULL FAITH AND CREDIT CLAUSE

*Heather Hamilton*

## INTRODUCTION

While the right to marry has long been recognized as a fundamental right by the Supreme Court,<sup>1</sup> the contention that the fundamental right to marry encompasses same-sex marriages had, prior to 1996, been universally rejected by the courts.<sup>2</sup> Then, in *Baehr v. Miike*,<sup>3</sup> a Hawaii Circuit Court held, on remand from the Hawaii Supreme

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1. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684-85 (1977) (“While the outer limits have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships and child rearing and education.’” (citations omitted)); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” (citations omitted)); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as “an association for as noble a purpose as any involved in our prior decisions”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage as “fundamental to the very existence and survival of the race”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing marriage as “essential to the orderly pursuit of happiness by free men”); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (describing marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress”).

2. *See Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (refusing to recognize same-sex marriage as valid for purposes of immigration); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (holding that the right for same-sex couples to marry was not protected by the Fourteenth Amendment Due Process Clause nor by a District of Columbia marriage statute); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (holding that the United States Constitution does not sanction or protect the right to marry between same-sex couples); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (rejecting the contention that the limitation of the right to marry for opposite-sex couples resulted in violation of the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971) (refusing to recognize a same-sex marriage); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (refusing to grant a same-sex couple a divorce, because same-sex couples could not enter into common-law marriages); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the denial of the right to marry for same-sex couples did not deny equal protection of the laws).

3. CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

Court, that the denial of the right to marry to same-sex couples violated the Equal Protection Clause of the Hawaii constitution.<sup>4</sup> In reaching its conclusion, the Hawaii court stated that the State had failed to sustain its burden of showing that the Hawaii marriage statute limiting the right to marry to different-sex couples "further[s] a compelling state interest."<sup>5</sup> Thus, same-sex couples in Hawaii should soon be able to enter into state-sanctioned marriages.<sup>6</sup>

In anticipation of the imminent legalization of same-sex marriages in Hawaii, Congress passed the Defense of Marriage Act ("DOMA"),<sup>7</sup> otherwise known as "[a]n Act to define and protect the

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4. *Id.* at \*22 (citing HAW. CONST. art. I, § 5). In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *remanded sub nom.*, *Baehr v. Muike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), the Hawaii Supreme Court examined whether the denial of the right to marry for same-sex couples solely because the applicants were of the same-sex violated their right to privacy and equal protection as guaranteed by the Hawaii Constitution. *Id.* at 48. The court first held that the denial of the marriage license did not implicate the constitutional right to privacy, because the right to same-sex marriage was not so rooted in the traditions and collective conscience of Hawaii's people that failure to recognize it would violate fundamental principles of liberty and justice. *Id.* at 57. In addition, the court stated that same-sex marriages are not implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. *Id.* The Hawaii Supreme Court then held that the marriage license requirement was subject to "strict scrutiny," because it was based on impermissible gender classifications. *Id.* at 63. The court concluded that because the Hawaii regulation denied same-sex couples the access to marital status and its concomitant rights and benefits, the Equal Protection Clause of the Hawaii Constitution was implicated. *Id.* The court then remanded the case to the Hawaii Circuit Court for a determination of whether the statute furthered compelling state interests and was narrowly drawn to avoid unnecessary abridgements of constitutional rights. *Id.* at 68. Absent such a determination, the court stated the limitation of the right to marry to different-sex couples would violate the Equal Protection Clause of the Hawaii Constitution. *Id.*

5. CIV. No. 91-1394, 1996 WL 694235, at \*21. On remand, the circuit court considered whether the State had a compelling and substantial interest to justify the sex-based classification in the Hawaii marriage statute. *Id.* at \*3. The State of Hawaii contended that it had a compelling interest in fostering procreation within a marital setting; in securing or assuring recognition of Hawaii marriages in other jurisdictions; in protecting the health and welfare of children and other persons; in protecting the State's public fisc from the reasonably foreseeable effects of recognition of same-sex marriages; and in protecting the civil liberties of its citizens. *Id.* Both the State and the plaintiffs presented expert witness testimony in support or opposition of each of the State's asserted interests. *Id.* at \*4-16. The court held that the State had failed to establish or prove any adverse consequences to the public, to the institution of marriage, or to Hawaii citizens if other states refused to recognize Hawaii marriages. *Id.* at \*18. More importantly, the court found there was no evidence that recognition of same-sex marriages would have any adverse effects upon the well-being or optimal development of children in same-sex marital households. *Id.* Thus, the court concluded that the State had failed to present a significant interest to justify the withholding of marital status from same-sex couples. *Id.* at \*21.

6. In response to the *Baehr* decision, the Hawaii legislature amended the Hawaii marriage statutes to provide that a legal marriage may exist between a man and a woman only. 1994 HAW. SESS. LAWS 217.

7. Defense of Marriage Act, Pub. L. No. 104-199, 110 STAT. 2419 (codified at 1 U.S.C. § 7 (1997); 28 U.S.C. § 1738C (1997)). The Defense of Marriage Act is hereinafter referred to as DOMA.

institution of marriage.”<sup>8</sup> DOMA has two provisions. The first provision defines “marriage” and “spouse” under federal law to include only partners of the opposite sex.<sup>9</sup> The congressional exclusion of same-sex marriages from federal law prevents same-sex marital partners from utilizing numerous federal benefits; according to the United States General Accounting Office Report on DOMA, there is “a collection of 1049 federal laws classified to the United States Code in which marital status is a factor.”<sup>10</sup>

The second provision of DOMA provides that a state “shall not be required to recognize same-sex marriages performed in other states.”<sup>11</sup> The second provision of DOMA will likely face a constitutional challenge on the grounds that it violates the Full Faith and Credit Clause of Article IV of the United States Constitution.<sup>12</sup> Prior

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8. H.R. Res. 3396, 104th Cong., 2d Sess. (1996) (enacted). Interestingly, DOMA was enacted in the midst of a congressional and presidential election year. The Hawaii decision generated much public disdain from the “moral majority.” See Greg Zoroya, *A Leader Falls Amid a War in the House Politics: Gay Congressman Steve Gunderson Will Quit, but Not Before Writing a Book*, L.A. TIMES, Aug. 25, 1996, at E2 (noting that in congressional debate over DOMA, legislators claimed that gay rights groups were “scheming” to legalize same-sex marriages; that Congress “must take a stand;” and that a culture that embraces homosexuality is doomed). Congress reacted swiftly to this negative public sentimentality by passing DOMA. *Id.* (noting the bill passed by a vote of 342-67 with only one Republican voting against DOMA). It is likely that this election year bill was motivated primarily by campaign rhetoric rather than a true need to uphold the marriage institution as stated in the bill. See Bill Lambrecht, *Election Year Puts Political Spin on Gay Rights; a Case in Hawaii Challenges Traditional View of Marriage*, ST. LOUIS POST-DISPATCH, May 20, 1996, at 1A (“[A] social institution regarded by many as clear-cut is a matter of hot debate. And something regarded as a fringe issue not long ago is being promoted as a key element of the family-values debate in political campaigns.”).

9. 1 U.S.C. § 7. The full language of § 1 of DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

10. Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 301 (1997) (citing Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary House of Representatives, United States General Accounting Office, Jan. 31, 1997, at 2 (Fed. Doc. Clearing House 1996) <<http://www.gao.gov/reports.htm>>); see also *infra* notes 155-63 and accompanying text.

11. 28 U.S.C. § 1738C. In full, § 2 of DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.

*Id.*

12. U.S. CONST. art. IV, § 1; see also Lisa Bennet, *No Defense for Congress's Defense of Marriage Act*, SALT LAKE TRIB., Sept. 16, 1996, at A9 (opining that “the Defense of Marriage Act is widely thought to be ultimately indefensible—that is, unconstitutional” because it violates Arti-

to the passage of DOMA, Congress's power under Article IV has only been exercised in an affirmative manner, that is, stating that valid acts, records, and judicial proceedings of other states *shall* be given effect.<sup>13</sup> DOMA represents the first time Congress has exercised its power under the Full Faith and Credit Clause in a negative manner, that is, stating that a valid same-sex marriage in one state *need not* be given effect in sister states.<sup>14</sup> This exercise of congressional power under Article IV, thus presents a constitutional quandary of first impression.<sup>15</sup>

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cle IV's Full Faith and Credit Clause); Connie Paige, *Gov Knocks Gay Marriage but Calls Fed Bill Illegal*, BOSTON HERALD, July 23, 1996, at 12 (quoting Governor William Feld of Massachusetts as stating, "I'm not a proponent [of gay marriages], but I am a proponent of the U.S. Constitution, which guarantees full faith and credit to a judicial or juridical act of another state"); Tobias Young, *Local Activists Say Law Will be Overturned*, PRESS DEMOCRAT, Sept. 22, 1996, at A6 (noting that the president of a local gay, lesbian, and bisexual newspaper said DOMA would be struck down by the Supreme Court as unconstitutional); Patricia Wen, *Measure Barring Gay Marriages Seen as Vulnerable*, BOSTON GLOBE, Sept. 12, 1996, at B1. Wen noted that "legal experts say someone is bound to bring a lawsuit, asking the court to strike down the Defense of Marriage Act as unconstitutional." *Id.* In addition, Wen interviewed Laurence H. Tribe, a professor of Constitutional Law at Harvard Law School, who said DOMA violates the part of the Constitution that requires "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" and that Congress cannot invite some states to disregard the official acts of others. *Id.* Next, Wen interviewed Jay Sekulow, Chief Counsel for the American Center for Law and Justice in Virginia Beach, Virginia, who stated that he interprets the Constitution to say Congress does have power to pass DOMA, because Congress has the power to determine how state actions in one state will be implemented in other states or how binding they will be. *Id.* Finally, Wen interviewed Professor Allan Macurduy of Boston University who stated "[d]oes it violate federalism principles? You bet." *Id.*

13. See 28 U.S.C. § 1738 (1994) (stating that acts, records, and judicial proceedings of any court of any state, territory, or possession, shall have the same full faith and credit in every court within the United States and its territories from which they are taken); *id.* § 1738A (stating that child custody determinations made in a state shall be given effect in all other states).

14. *Id.* § 1738. The exercise of Congress's power under the Full Faith and Credit Clause differs from congressional legislation in the choice of law context. Choice of law questions address the allocation of authority among the several states. Douglas Laylock, Comment, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992). In particular, when parties are before a state court, choice of law questions decide which state law should be applied to the controversy. *Id.* at 255. Choice of law issues are generally resolved so that the state that has the most "significant contact or significant aggregation of contacts" with the parties before the court is the state whose law is applied. *Id.* (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981)).

True choice of law disputes differ from the situation presented by DOMA where there is no ongoing dispute. The choice is not whether to apply the law of State A or B, but rather, whether State A should be required to recognize the marriages validly performed in State B. The choice is, thus, not which State's law to apply but whether or not to recognize another State's law.

15. Because no same-sex couple has yet to be married pursuant to the *Baehr* decision, no constitutional challenges to DOMA have yet been filed in the courts. This creates a standing problem for DOMA opponents. The Supreme Court has explained: "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues

This Comment explains why Congress violated the mandates of the Full Faith and Credit Clause when it enacted section 2 of DOMA. Part I.A analyzes the text and history of the Full Faith and Credit Clause. Part I.B presents the Supreme Court decisions analyzing the Full Faith and Credit Clause. Part I.C sets forth the reasons why the right to marry is of paramount concern for same-sex couples. Part I.D presents the pre-DOMA statutory mechanisms governing the interstate recognition of marriages.

Part II examines DOMA against this background. This Comment recognizes that Congress's power under Article IV, as shown by Supreme Court precedent, is a remedial power; a power that allows Congress to give force to the Full Faith and Credit Clause via congressional legislation rather than a power that allows Congress to legislatively remove the requirements of the clause. This Comment contends that Congress violated those minimum requirements by, for the first time in congressional history, stating that the states do not have to follow the mandate of the Full Faith and Credit Clause. Part III will analyze the important repercussions of DOMA on same-sex couples including the denial of the fundamental right to marry and the host of marital benefits denied to same-sex couples. Additionally, this Comment argues that, if upheld as constitutional, DOMA sets a dangerous precedent by giving constitutional effect to a statute rescinding a protection guaranteed by the Constitution. This Comment concludes that because Congress exceeded its powers under Article IV when it enacted DOMA, the Act should be declared unconstitutional.

## I. BACKGROUND

### A. *The Text and History of the Full Faith and Credit Clause*

The Full Faith and Credit Clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State."<sup>16</sup>

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upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). A personal stake is created where the plaintiff has an existing controversy with the defendant, whether the plaintiff is suing on his own behalf or on behalf of a class as well. *Sosna v. Iowa*, 419 U.S. 393, 411 (1975). Presumably, the Court would not entertain a constitutional challenge without a state recognizing same-sex marriages. If no state recognizes same-sex marriages, then there would be no "existing controversy" as required by the standing doctrine. *Id.* Accordingly, until same-sex marriages are actually recognized in Hawaii or another state, any attempt to challenge the constitutionality of DOMA will likely fail due to standing problems.

16. U.S. CONST. art. IV, § 1. The precise meaning of the Full Faith and Credit Clause was not discussed much at either the Constitutional Convention or the state ratifying conventions. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988). The expectation of the Framers, however,

The clause represents a congressional pronouncement that judgments "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."<sup>17</sup> In order to give effect to the full faith and credit requirement of Article IV, Congress was expressly granted the power to "by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."<sup>18</sup>

The First Congress passed the Full Faith and Credit Act in 1790.<sup>19</sup> The 1790 Act provided methods to authenticate acts, records, and judicial proceedings and repeated the Full Faith and Credit Clause's requirement that acts, records, and judicial proceedings of states are entitled to Full Faith and Credit in sister states.<sup>20</sup> In 1804, Congress amended the Full Faith and Credit Act to assure authentication of non-judicial proceedings.<sup>21</sup> Currently codified at 29 U.S.C. § 1738A, the Full Faith and Credit Act states: "Acts, records, and judicial proceedings . . . [of any State] shall have the same full faith and credit in every court within the United States . . . as they have by the law or usage in the Courts of [the] State from which they are taken."<sup>22</sup> The Full Faith and Credit Act governs interstate recognition of laws at all levels of state and federal government, and includes United States' territories and Indian tribunals.<sup>23</sup> The Supreme Court has interpreted

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was that it be interpreted against "the background of principles developed in international conflicts law." *Id.*

17. Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1994)).

18. U.S. CONST. art. IV, § 1.

19. Act of May 26, 1790, ch. 11, 1 Stat. 122.

20. *Id.*

21. Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1739 (1994)).

22. 28 U.S.C. § 1738 (1994).

23. See *Clements v. Airport Auth.*, 69 F.3d 321, 326 (9th Cir. 1995) (stating that administrative agencies' findings must be given full faith and credit in state and federal courts); *Semler v. Psychiatric Inst., Inc.*, 575 F.2d 922, 928 (D.C. Cir. 1978) (stating that federal courts exercising diversity jurisdiction must give to a judgment of a federal court the same full faith and credit that a state court would be obligated to give a judgment of state court in another forum); *Wayside Transp. Co. v. Marcell's Motor Exp., Inc.*, 284 F.2d 868, 870-71 (1st Cir. 1960) (stating that Congress imposed a duty on federal courts through the Act to give full faith and credit to judgments of state courts); *Kumar v. Chicago Hous. Auth.*, 862 F. Supp. 213, 215 (N.D. Ill. 1994) (stating that federal courts must give preclusive effect to state court judgments whenever courts of that state would do so); *Hall v. Hall*, 208 A.2d 593, 595 n.1 (Md. 1965) (stating that DOMA requires judicial proceedings of both legislative courts and of constitutional courts to be given full faith and credit); *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994) (stating that judgments of an Indian tribal court would be given full faith and credit in state court). But see *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984) (stating that labor arbitration board findings need not be given preclusive effect in state and federal courts); *Holley v. Seminole County School Dist.*, 763 F.2d 399, 400 (11th Cir. 1985) (finding that DOMA did not apply to school board proceedings because such proceedings are not "judicial"); *Tonga Air Serv., Ltd. v. Fowler*, 826 P.2d 204, 208

the Full Faith and Credit Act to have only the same effect as the Full Faith and Credit Clause.<sup>24</sup> Thus, the Full Faith and Credit Act imposes no greater requirements than that already imposed by the Full Faith and Credit Clause.

It was not until 1980 that Congress again exercised its Article IV power when it passed the Parental Kidnapping Prevention Act ("PKPA").<sup>25</sup> PKPA provides that child custody rulings in one state shall be honored by all other states.<sup>26</sup> PKPA applies to all custody determinations, adoption proceedings, and visitation determinations.<sup>27</sup> Like the Full Faith and Credit Act, PKPA has been interpreted by the Court to have only the same operative effect as the Full Faith and Credit Clause.<sup>28</sup> Thus, PKPA likewise imposes no greater requirements than the Full Faith and Credit Clause.

In 1994, Congress twice exercised its Article IV power when it passed the Full Faith and Credit for Child Support Orders Act of 1994<sup>29</sup> and the Safe Homes for Women Act of 1994.<sup>30</sup> As reflected by its title, the Full Faith and Credit for Child Support Orders Act of 1994 assures that a child support order entered in one state will be honored by sister states.<sup>31</sup> The Safe Homes for Women Act of 1994 provides that any protection order issued by a state will be accorded full faith and credit in sister states.<sup>32</sup> Like PKPA, the 1994 Acts were passed to assure the operation of the Full Faith and Credit Clause in specific areas, but did not expand the operation of the clause.

Finally, in 1996, Congress passed DOMA pursuant to its Article IV power.<sup>33</sup> Section 2 provides:

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(Wash. 1992) (noting that foreign country judgments are not vested with constitutional or statutory full faith and credit).

24. *Thompson v. Thomson*, 484 U.S. 174, 183 (1988).

25. 28 U.S.C. § 1738A. The Parental Kidnapping Prevention Act is hereinafter referred to as PKPA.

26. *Id.*

27. *See Heartfield v. Heartfield*, 749 F.2d 1138, 1143 (5th Cir. 1985) (holding that child support determinations and visitation rights are covered by PKPA); *In re B.B.R.*, 566 A.2d 1032, 1036-37 (D.C. 1989) (holding that an adoption proceeding is covered by PKPA).

28. *Thompson*, 484 U.S. at 174.

29. 28 U.S.C. § 1738B.

30. 18 U.S.C. § 2265 (1994).

31. 28 U.S.C. § 1738B.

32. 18 U.S.C. § 2265.

33. 1 U.S.C. § 7 (1994); 28 U.S.C. § 1738C. The language of § 2 of DOMA is nearly identical to the language embodied in the Full Faith and Credit Clause. The Full Faith and Credit Clause addresses "public Acts, Records, and judicial Proceedings of every other State," U.S. CONST. art IV, § 1, while DOMA addresses "any public act, record, or judicial proceeding of any other State, territory, possession, or tribe." 28 U.S.C. § 1738C. In addition, both the Full Faith and Credit Clause and DOMA govern interstate recognition of such acts, records, and judicial proceedings. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738C. Because DOMA states that interstate



No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>34</sup>

Section 2 of DOMA was passed to assure that no state will "be obligated or required by operation of the Full Faith and Credit Clause of the United States Constitution to recognize [a same-sex] marriage or any right or claim arising from it."<sup>35</sup> Congress felt that the passage of DOMA was necessary to: (1) defend and nurture the institution of marriage;<sup>36</sup> (2) defend traditional notions of morality;<sup>37</sup> (3) protect state sovereignty and democratic self-governance;<sup>38</sup> and (4) preserve scarce government resources.<sup>39</sup>

DOMA stands in sharp contrast to the prior congressional exercises pursuant to Article IV. While the Full Faith and Credit Act, PKPA, the Full Faith and Credit for Child Support Orders Act of 1994, and the Safe Homes for Women Act of 1994 were each enacted to assure the operation of the Full Faith and Credit Clause in specific areas, DOMA was passed to assure the clause would not operate in the arena of same-sex marriages.<sup>40</sup> Even DOMA proponents recognized that DOMA was questionable under the congressional mandate found in Article IV.<sup>41</sup> Therefore, DOMA differs significantly from prior legislation passed pursuant to Article IV.<sup>42</sup>

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recognition of same-sex marriages is not required, DOMA was passed pursuant to *Congress's* Article IV power which is embodied in the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1; see also James R. Stoner, Jr., *Marriage and the Constitution*, NEW ORLEANS TIMES-PICAYUNE, July 7, 1996, at B6 ("Quoting the entire full faith and credit clause of the Constitution make [sic] plain enough, to common sense if not to every federal judge, the constitutional basis of the Defense of Marriage Act now before Congress.").

34. 28 U.S.C. § 1738C. Marriage is considered a "record" under the Full Faith and Credit Clause. Deborah M. Henson, Note, *Will Same-Sex Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 586 (1994).

35. H.R. REP. NO. 104-664, at 25, (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2929.

36. *Id.* at 12.

37. *Id.* at 15.

38. *Id.* at 16.

39. *Id.* at 18.

40. *Id.* at 26.

41. *Id.* at 25. DOMA supporters admitted in the congressional debates that "[t]he Founders, in short, wanted to encourage, even to require the States to respect the laws of sister States."

42. A full awareness of *Congress's* Article IV power can be realized by distinguishing DOMA from other congressional legislation addressing domestic relations issues that was passed pursuant to other sections of the Constitution. An examination of the other congressional legislation

*B. Supreme Court Jurisprudence Concerning the Mandates of the Full Faith and Credit Clause*

The effect of the Full Faith and Credit Clause on interstate recognition of marriages has never been explicitly examined by the Supreme Court. Nevertheless, Supreme Court pronouncements on the effects of this clause provide meaningful insight as to the constitutionality of DOMA under the Full Faith and Credit Clause. This subpart presents Supreme Court jurisprudence regarding the requirements of the Full

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in the domestic relations area illustrates that Congress has never before passed legislation denying the substantive right to marry to a class of individuals.

In *Cleveland v. United States*, 329 U.S. 14 (1946), the Court analyzed the constitutionality of the Mann Act, 18 U.S.C. § 398, which made it an offense to transport in interstate commerce any female for prostitution or other immoral purpose. *Cleveland*, 329 U.S. at 16. The power of Congress to regulate polygamous marriages centered on Congress's power under the Commerce Clause, because the Act focuses on the transport of females in interstate commerce. *Id.* at 20. The Court concluded, based on policy principles, that the Mann Act could encompass polygamous marriages. *Id.* at 18. The Court reasoned that policy principles warranted this approach because:

Polygamy has always been odious among the northern and western nations of the Europe, and until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England, polygamy has been treated as an offense against society.

*Id.* *Cleveland* established that Congress may regulate marital relations when the existence of such a relation constitutes a crime. *Id.* at 20.

DOMA differs from the Mann Act in several respects. Primarily, DOMA was passed pursuant to Congress's Article IV power rather than its interstate commerce power. H.R. Rep. No. 104-664, at 25 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2929. Second, neither DOMA nor any other legislative enactment, state or federal, criminalizes same-sex marriages. Thus, rather than committing a crime by passing over state lines, same-sex couples would merely be exercising their constitutional right to travel.

In *Anetekhai v. INS*, 876 F.2d 1218 (5th Cir. 1989), the Fifth Circuit analyzed the constitutionality of a two-year residency requirement for aliens who marry United States citizens while subject to deportation proceedings. *Id.* at 1220 (citing 8 U.S.C. § 1154(h)). The court noted that Congress had enacted the requirement pursuant to its plenary power over immigration matters. *Id.* at 1221. The court concluded that Congress had not overstepped its authority in enacting the requirement, because the residency requirement did not affect the legal status of marriage. *Id.* at 1222.

Again, DOMA differs because it was passed pursuant to Article IV. H.R. Rep. No. 104-664, at 25. In addition, DOMA involves a matter of state expertise, domestic relations, while the INS regulation involved a matter of congressional expertise, immigration. See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (noting that the domestic relations arena is a matter of state expertise); *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.D.C. 1977) (recognizing that Congress and the United States Attorney General, by Congress's delegation, have authority over immigration matters and from that authority have derived expertise in immigration matters). Moreover, DOMA does affect the legal status of marriage. Rather than imposing a waiting period to enter into a marriage (as was the case in *Anetekhai*), DOMA states that a marriage never need be recognized at all. 28 U.S.C. § 1738C (1994). *Cleveland* and *Anetekhai* illustrate that DOMA represents a unique exercise of Congressional power, extending far beyond prior restraints to the right to marry.

Faith and Credit Clause. Subpart I.B.1 presents Supreme Court cases recognizing the important role of the Full Faith and Credit Clause in the American system of government and sets forth Supreme Court pronouncements on Congress's power under Article IV. Subpart I.B.2 explains the two recognized exceptions to the Full Faith and Credit Clause: the procedural exception and the public policy exception. Included in the analysis of these exceptions is a summary of the application of the public policy exception to same-sex marriages.

1. *The Purpose of the Full Faith and Credit Clause and the Extent of Congress's Power under Article IV*

The Supreme Court has recognized that the Full Faith and Credit Clause is at the heart of our federal government.<sup>43</sup> In *Milwaukee County v. M.E. White Co.*,<sup>44</sup> the Court stated: "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties."<sup>45</sup> The clause "prescribes a rule by which courts are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a state other than that in which the court is sitting."<sup>46</sup>

In *Sherrer v. Sherrer*,<sup>47</sup> the Court echoed this sentiment and stated that the Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation."<sup>48</sup> The Court concluded that the fact that local law must give way under the weight of the Full Faith and Credit Clause is the price of having a cohesive nation.<sup>49</sup> *Sherrer* and *Milwaukee County* illustrate the importance of the clause in constitutional jurisprudence.

Despite the important role of the Full Faith and Credit Clause in our federal government, the Court has addressed the Congressional power to pass laws under the Full Faith and Credit Clause only tan-

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43. *Milwaukee County v. M.E. White Co.* 296 U.S. 268, 276-77 (1935).

44. 296 U.S. 268 (1935).

45. *Id.* at 276-77. The Court also held that conflict of law principles are enforceable as a constitutional mandate. *Id.*; accord *Sun Oil v. Wortman*, 486 U.S. 717, 723 (1988) (stating that the clause was enacted with "an expectation that it would be interpreted against the background of principles developed in international conflicts law"); *Estin v. Estin*, 334 U.S. 541, 546 (1948) (stating that the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns").

46. *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 72 (1904).

47. 334 U.S. 343 (1948).

48. *Id.* at 355.

49. *Id.* The Court held that a Florida divorce decree must be given full faith and credit in Massachusetts. *Id.*

gentially. In *Thompson v. Thompson*,<sup>50</sup> the Court examined whether a congressional statute extended a private right of action under the clause.<sup>51</sup> At issue in *Thompson* was the constitutionality of PKPA, an act passed by Congress which required states to afford full faith and credit to valid child custody determinations ordered by other states.<sup>52</sup> The Court rejected the petitioner's contention that PKPA created a private cause of action.<sup>53</sup> Instead, the Court stated that PKPA was only "an addendum to . . . and is intended to have the same operative effect as the federal full faith and credit statute."<sup>54</sup> Thus, the Court in *Thompson* viewed congressional legislation mirroring the language of the Full Faith and Credit Clause as having no additional substantive impact.

The Court, however, has made clear that Congress's Article IV power is limited by the requirements of the Full Faith and Credit Clause. In *Thomas v. Washington Gas Light Co.*,<sup>55</sup> a resident of the District of Columbia received an award of disability benefits under the Virginia Workmen's Compensation Act for injuries received in Virginia.<sup>56</sup> Subsequently, the resident sought a supplemental award under the District of Columbia Workmen's Compensation Act.<sup>57</sup> The employer claimed that the Full Faith and Credit Clause precluded a second award for the same injuries.<sup>58</sup> The Court held that an award of disability benefits from the Virginia Worker's Compensation Commission did not preclude a subsequent award of benefits from another state for the same injury.<sup>59</sup> In reaching its decision, the Court reversed the Fourth Circuit which had held that the supplemental award violated the Full Faith and Credit Clause.<sup>60</sup> In dicta, the Court explained Congress's Article IV power:

The full faith and credit area presents special problems, because the Constitution expressly delegates to Congress the authority "by general Laws [to] prescribe the Manner in which [the States'] Acts, Records and Proceedings shall be proved, and the Effect thereof." . . . Yet it is quite clear that Congress's power in this area is not

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50. 484 U.S. 174 (1988).

51. *Id.* at 175.

52. *Id.*

53. *Id.* at 183.

54. *Id.*

55. 448 U.S. 261 (1980).

56. *Id.* at 264 (citing VA. CODE ANN. § 65.1-92 (Michie 1950)).

57. *Id.* at 265-66 (citing D.C. CODE ANN. § 501-502 (1968)).

58. *Id.* at 265.

59. *Id.* at 286.

60. *Id.* at 266.

exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation. . . .

Thus, while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.<sup>61</sup>

The Court's language in *Thomas* makes clear that Congress has the power to require states to recognize the acts and judgments of sister states. The dicta in *Thomas* also suggests that the Court will question the constitutionality of any congressional attempt to pass legislation that authorizes states to ignore the acts of sister states.<sup>62</sup>

## 2. *Court-Recognized Exceptions to the Mandates of the Full Faith and Credit Clause and Their Application to Same-Sex Marriages*

The broad language of the Full Faith and Credit Clause contains no exceptions to its requirements.<sup>63</sup> However, the Court has never considered the requirements of the Full Faith and Credit Clause to be

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61. *Id.* at 272-73 n.18 (citations omitted).

62. The limitations imposed by the Court on the power of Congress to legislate pursuant to Article IV are consistent with the federalism principles underlying the Constitution. The Constitution gives the Court the power to judge all cases arising under the Constitution. U.S. CONST. art. III, § 2. Congress may not indirectly repeal other provisions of the Constitution or violate the substantive guarantees of the Constitution. *Fullilove v. Klutznick*, 448 U.S. 448, 528 n.7 (1980) (Stewart, J., dissenting); see also *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) ("[T]he Fourteenth Amendment does not override all principles of federalism."); *Oregon v. Mitchell*, 400 U.S. 112, 128-30 (1970) (holding that amendments to the Voting Rights Act enfranchising 18-year olds for the purposes of federal elections, abolishing literacy tests as requisite to vote, and abolishing durational residency requirements as a requirement to vote in presidential elections were constitutional but amendments enfranchising 18-year olds to vote in state and local elections were beyond Congress's Fourteenth Amendment power); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (holding that Section Five of the Fourteenth Amendment did not empower Congress to remove its protections). Thus, Congress is bound by the Supreme Court's interpretation of the Constitution when legislating. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1555 (11th Cir. 1984). If Congress passes a provision of law that undermines the authority and independence of another branch, that provision of law is unconstitutional. *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

63. See *Allstate v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality) (noting that the Full Faith and Credit Clause only sets forth the requirement that the forum state avoid applying its own law to a controversy when doing so would be "arbitrary" or "fundamentally unfair"); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) (holding that conflicts between the statutes of two states ought not to be resolved "by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight"); *Sherrer v. Sherrer*, 334 U.S. 343, 357-58 (1948) (Frankfurter, J., dissenting) (citing *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873)). In *Sherrer*, Justice Frankfurter stated:

absolute; instead, the clause has been interpreted to impose certain minimum requirements. In *Wells v. Simonds Abrasive Company*,<sup>64</sup> the Court noted that “[t]he Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.”<sup>65</sup> In *Phillips Petroleum v. Shutts*,<sup>66</sup> the Court explained: “The minimum requirements imposed by the Full Faith and Credit Clause are that a forum State should not apply its law unless it has ‘a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.’”<sup>67</sup> This subpart examines the Supreme Court jurisprudence addressing the limitations of the Full Faith and Credit Clause. In particular, this subpart analyzes the Court’s decisions that held that the Full Faith and Credit Clause does not apply to procedural matters, nor to laws, records, or acts of sister states which would violate the “public policy” of the state where interstate recognition is desired.<sup>68</sup>

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It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873.

*Id.* Had the Supreme Court interpreted the Full Faith and Credit Clause to be absolute and admitting of no exceptions or modifications, it is clear that DOMA would be unconstitutional. This is because under an absolutist approach, any failure by any State to recognize the records, acts, or proceedings of another State would be an automatic violation of the Full Faith and Credit Clause. *See id.* Such an approach would be reticent of the approach advocated by Justice Black in his constitutional jurisprudence. *See Barenblatt v. United States*, 360 U.S. 109, 134-35 (1959) (Black, J., dissenting) (stating that the constitutional guarantees of free speech and press are absolute prohibitions against governmental regulation); *Adamson v. California*, 332 U.S. 46, 70-71 (1947) (Black, J., dissenting) (stating that the word liberty in the Due Process Clause of the Fourteenth Amendment was meant to contain all protections of the Bill of Rights). Perhaps for the same reasons the Court rejected Justice Black’s absolutist approach, it opted against an absolutist approach for the Full Faith and Credit Clause. *See CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION* 85-87 (5th ed. 1992) (noting that the Court rejected Black’s approach because many words have more than one meaning; the framer’s intent is unclear; some constitutional provisions embody rules not constitutional principles; and most importantly, it renders judges without judicial discretion).

64. 345 U.S. 514 (1953).

65. *Id.* at 516.

66. 472 U.S. 797 (1985).

67. *Id.* at 818.

68. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) (Brennan, J., concurring) (stating that the Full Faith and Credit Clause applies only to substantive laws between sister states); *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (“[T]he Full Faith and Credit Clause does not require a state to apply another state’s law in violation of its own legitimate public policy.”).

a. The Procedural Matter Exception to the Full Faith and Credit Clause

The Supreme Court has established that the minimum requirements of the Full Faith and Credit Clause do not extend to procedural matters. In *Sun Oil Co. v. Wortman*,<sup>69</sup> the plaintiff contended that the application of the Kansas statute of limitations in a Kansas court violated the Full Faith and Credit Clause because the Kansas statute of limitations differed from the law in Texas, Oklahoma, and Louisiana where the vast majority of the plaintiffs resided.<sup>70</sup> The Court disagreed and stated that the Full Faith and Credit Clause applies only to substantive rather than procedural laws.<sup>71</sup> In reaching its conclusion, the Court explained the substantive-procedural dichotomy:

Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of our *Erie* jurisprudence, that purpose is to establish . . . substantial uniformity of predictable outcome[s] between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits. The purpose of the substance-procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity, but to delimit spheres of state legislative competence. . . . [S]ince the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.<sup>72</sup>

Thus, where the dispute is over which state's law to apply and the law is procedural in nature, the states are free to apply their own law.<sup>73</sup>

Same-sex marriage proponents will not likely attempt to rely on the procedural exception to the requirements of the Full Faith and Credit Clause. Courts have universally considered the denial of the right to enter marital union as involving a substantive right, rather than a procedural right.<sup>74</sup> The view of marriage as a substantive right derives from the many societal and economic benefits attached to the marital

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69. 486 U.S. 717 (1988).

70. *Id.* at 736.

71. *Id.*

72. *Id.* at 726-27 (citing *Hanna v. Plumer*, 380 U.S. 460, 467, 471-74 (1965); *Guaranty Trust v. York*, 326 U.S. 99, 109 (1945); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

73. *Id.*

74. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the denial of the right to marry violates the Constitution); *cf.* *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989) (holding that the procedural limitation of two year residency on the right to marry did not violate the Constitution because the parties were not forever deprived of the right to marry).

union.<sup>75</sup> While same-sex marriage proponents could raise an argument that the procedural exception to the Full Faith and Credit Clause applies, given the recognition by the courts of the substantive nature of the right to marry, attempted application of the procedural exception is unlikely.

b. The Public Policy Exception to the Full Faith and Credit Clause

The Court has also recognized that the requirements of the Full Faith and Credit Clause do not extend to those acts, records, or proceedings, which, if recognized, would violate the public policy of a state. The public policy exception to the Full Faith and Credit Clause was first discussed by the Court in *Pacific Ins. Co. v. Industrial Accident Comm'n*,<sup>76</sup> where the Court stated that the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy.<sup>77</sup> In *Pacific*, California desired to apply its own worker's compensation act in a case involving a Massachusetts employee and employer conducting business in California.<sup>78</sup> The Court reasoned:

It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes of policy. And in the case of a statute, the extra-state effect of which Congress has not prescribed as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though the statute is of controlling force in the courts of the state of its enactment with respect to the same person and events. . . . Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and

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75. See Robert L. Cordell, Comment, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247, 255 (1994) (discussing a host of marital benefits denied to same-sex couples including tax benefits, inheritance rights, health benefits, post-divorce rights, immigration rights, and the right to bring a wrongful death suit); see also *infra* notes 153-71 and accompanying text.

76. 306 U.S. 493 (1939).

77. *Id.* at 501-02; see also *Nevada v. Hall*, 440 U.S. 410, 421 (1979) (holding that the Full Faith and Credit Clause did not require a California court to apply Nevada's \$25,000 maximum limitation in Nevada's statutory waiver of its own immunity from suit in its own courts); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 547-49 (1935) (holding that a law exempting certain bonds of the enacting state from taxation did not apply extraterritorially by virtue of the Full Faith and Credit Clause).

78. *Pacific*, 306 U.S. at 502.



credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of the employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.<sup>79</sup>

Thus, the Court in *Pacific* established that those extra-state laws that are "obnoxious to the policy" of the sister state will not be enforced.<sup>80</sup>

In *Nevada v. Hall*,<sup>81</sup> the Court made clear the force of the *Pacific* holding.<sup>82</sup> There, the State of Nevada contended that its \$25,000 cap on damages should be applied in a California court because the cap would be applicable in Nevada.<sup>83</sup> The Court disagreed, stating that the application of the Nevada law would violate the public policy of the State of California.<sup>84</sup> The Court reasoned that *Pacific* "clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."<sup>85</sup> Because application of the Nevada statute in California would be "obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery," California did not violate the Full Faith and Credit Clause by refusing to apply the Nevada statute.<sup>86</sup> Therefore, the Court has established that laws which violate a state's public policy will not be subject to the demands of the Full Faith and Credit Clause.

The "public policy" rationale prevents states from being forced to recognize those acts of other states which are fundamentally at odds with the views of the resident state. The public policy rationale set forth by the Court in *Pacific* is at the heart of the rules governing interstate recognition of marriages due to traditional state dominance in the domestic relations area. The Court has made clear that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."<sup>87</sup> Matrimonial status is a matter of public concern to

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79. *Id.* at 502-03.

80. *Id.*

81. 440 U.S. 410 (1979).

82. *Id.* at 421.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *see also* *Bond v. Trustees of the STA-ILA Pension Fund*, 902 F. Supp. 650, 655 (D. Md. 1995) ("[T]he definition and regulation of marriage is a traditional area of state authority."). The power of the states in the domestic relations arena derives from the Tenth Amendment, which establishes the power of the states. U.S. CONST. amend. X. Under the Tenth Amendment to the Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are re-

the states due to the states' direct interest in the rights between the contracting parties.<sup>88</sup> In essence, states are considered a "third party" to every marriage contract.<sup>89</sup> One court stated: "No state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy. . . . Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders."<sup>90</sup> Thus, states have always had the power to regulate the effect of marriage upon the property rights of the parties as well as the qualification of the contracting parties, the formalities necessary for its creation, the duties and obligations incident to the marriage relations, and the grounds for its dissolution.<sup>91</sup>

However, while the Court has recognized the legitimate interests of the states in controlling their domestic relations, the Court has also recognized the need for states to recognize marriages validly performed in sister states. In *Sherrer v. Sherrer*, the Court analyzed the dichotomy between state control of domestic relations and the requirements under the Full Faith and Credit Clause.<sup>92</sup> There, a Florida divorce decree was being challenged in Massachusetts.<sup>93</sup> The Court stated that:

It is pointed out that under the Constitution, the regulation and control of marital and family relationships are reserved to the States. It is urged, and properly so, that the regulation of the incidents of the marital relations involve the exercise by the States of powers of the most vital importance. But the recognition of the importance of a State's power to determine the incidents of basic social relationships into which its domicilaries enter does not resolve the issues of this case.<sup>94</sup>

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served to the States respectively, or to the people." *Id.* Thus, because the powers to control domestic relations were not specifically given to the executive branch, judiciary branch, or legislative branch, the states have control in this area. However, this control is still subject to the requirements of the Constitution. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (requiring Virginia to adhere to requirements of the Equal Protection Clause and thus to recognize interracial marriages); *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) (requiring Massachusetts to adhere to requirements of the Full Faith and Credit Clause and thus to recognize a Florida divorce decree). The recognition that domestic relations is a matter of state concern simply means that the judiciary gives great deference to state laws. *Justice v. Justice*, 475 S.E.2d 225, 230 (N.C. Ct. App. 1996). In addition, Congress may not pass laws which dictate to the states what their domestic relations laws must be. *Brawner v. Brawner*, 327 S.W.2d 808, 815 (Mo. 1959).

88. *Agler*, 280 U.S. at 383.

89. *Id.*

90. *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 366 (Va. 1939).

91. *Brawner*, 327 S.W.2d at 815 (citing 555 C.J.S. *Marriage* § 2, 809; 35 AM. JUR. *Marriage* § 12, 187).

92. *Sherrer*, 334 U.S. at 354.

93. *Id.* at 345.

94. *Id.* at 354.

The Court went on to say that state control over domestic relations must, at times, give way to the Full Faith and Credit Clause.<sup>95</sup> The Full Faith and Credit Clause recognizes Florida's "vital interest" in maintaining the legitimacy of its divorce decree and, in essence, commands Massachusetts to respect that interest.<sup>96</sup> *Sherrer* establishes that, while the Court recognizes the special interests of the state in regulating its domestic relations affairs, interstate recognition of extra-state proceedings involving domestic relations are still subject to the mandates of the Full Faith and Credit Clause.<sup>97</sup>

Opponents of same-sex marriages argue that the public policy exception is applicable to same-sex marriages, and, hence, a state cannot constitutionally be required to recognize a same-sex marriage validly entered into in a sister state. Traditional beliefs of the institution of marriage, which was one of the stated purposes of DOMA, offer the strongest basis for critics' argument that a public policy against same-sex marriages exists. The contention that the right to marry extends to same-sex couples has been a recent development,<sup>98</sup> a contention with

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95. *Id.*

96. *Id.* at 356.

97. *Id.*; see *Sosna v. Iowa*, 419 U.S. 393, 407 (1975) (analyzing the constitutionality of Iowa's one year residency requirement for obtaining a divorce, and stating: "Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other States under the Full Faith and Credit Clause of the Constitution, Art. IV, § 1"). Congress exceeds its powers under the Constitution where it legislates in the traditional areas of state sovereignty and prominence. See *United States v. Lopez*, 514 U.S. 549, 552, 567-68 (1995) (holding that the Gun Free School Zones Act exceeded Congress's power under the Commerce Clause). Congress did not encroach on the power of the states in enacting the Defense of Marriage Act. It is true that "the whole subject of domestic relations . . . belongs to the laws of the States and not to the laws of the United States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930). Congress does not infringe on the states' power to "make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States to the legislature" of each state unless the federal and state statutes are in conflict. *Labine v. Vincent*, 401 U.S. 532, 538 (1971); accord *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 180 (1978) (finding that the federal Tanker Law preempted state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (finding that the federal Fair Packaging Exchange Act did not preempt state regulation). Conflict exists only where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). DOMA states only that the states "*shall* not be required to recognize same-sex marriages performed in other states." 28 U.S.C. § 1738C (1994) (emphasis added). DOMA does not dictate that a state cannot recognize same-sex marriages nor does the Act require states to recognize same-sex marriages. *Id.* Rather, Congress leaves to the discretion of the states whether or not they shall recognize same-sex marriages, because it imposes no requirement for recognition or non-recognition. *Id.* Because Congress does not infringe upon the states' ability to define their domestic relations law, Congress did not usurp the states' power in violation of the separation of powers doctrine.

98. Not until 25 years ago did same-sex couples first begin asserting legal challenges to state laws prohibiting marriages between persons of the same sex. See H.R. REP. NO. 104-604, at 105 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906 (noting that the National Coalition for Gay

which two-thirds of Americans disagree.<sup>99</sup> Studies reveal that the vast majority of Americans concur with DOMA supporters that "[t]he effort to redefine marriage to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage."<sup>100</sup> DOMA proponents note that marriage plays a central role in our society due to the fact that marriage encourages responsible procreation and child rearing, is necessary to generational continuity, and represents societal approval of sexual relations.<sup>101</sup> Given the central role of the traditional male-female marital union, same-sex marriage opponents argue that recognition of a same-sex marriage would violate the public policy of the recognizing state.<sup>102</sup>

Same-sex couples argue, however, that no public policy exception is created despite the historical nature of the marital union. Primarily, they note that not only does society permit heterosexual couples to marry regardless of their ability to beget children, but same-sex couples can have a child via artificial insemination or adoption.<sup>103</sup> Additionally, even DOMA proponents have admitted that a public policy exception based on the traditional role of marriage is undermined, in part, by the fact that greater threats to the institution of marriage, such as divorce and unwed parenthood, currently exist.<sup>104</sup> Finally, same-sex couples can argue that to center on whether the public policy exception applies after the same-sex couple has already been legally married obscures the focus. After a same-sex couple has legally married the alleged threat to the institution of marriage has already materialized and, therefore, the focus should be on the rights of the married couple rather than on the interests of the recognizing state. Thus, while the traditional role of marriage provides a strong argument for the application of a public policy exception, same-sex couples have grounds to dispute its application.

Another potential basis for a public policy exception is the strong sentiment against sexual relations between persons of the same-sex. Judeo-Christian ethics condemn homosexuality and support hetero-

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Organization first called for the repeal of all legislative pronouncements against same-sex marriages in 1972).

99. Lynn D. Wardle, Comment, *A Critical Analysis of Constitutional Claims for Same-Sex Marriages*, 1996 BYU L. REV. 1, 57.

100. H.R. REP. NO. 104-604, at 105.

101. *Id.*

102. *Id.*

103. *Id.* The Restatement notes "the hardship that might otherwise be visited upon the parties and their children" if marriages were not recognized as valid in sister states. RESTATEMENT (SECOND) CONFLICTS OF LAWS § 283 cmt. (1971).

104. H.R. REP. NO. 104-604, at 105.

sexual marriages.<sup>105</sup> The Bible considers homosexuality an "abomination."<sup>106</sup> The moral disapproval of homosexuality is reflected by the legislation in nineteen states which criminalize sodomy.<sup>107</sup> Additionally, the Supreme Court established, in *Bowers v. Hardwick*,<sup>108</sup> that there is no constitutional right to engage in homosexual sodomy.<sup>109</sup> In *Bowers*, a homosexual man who was charged with the crime of sodomy challenged Georgia's sodomy statute claiming the statute put him in imminent danger of arrest.<sup>110</sup> The Court first noted that proscriptions against homosexual conduct have ancient roots.<sup>111</sup> Based on this history, the Court reasoned that the Constitution does not confer a fundamental right upon individuals to engage in homosexual acts.<sup>112</sup>

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105. *Id.*

106. Mark Tanney, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Government Interest*, 19 T. JEFFERSON L. REV. 99, 119 (1997) ("If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood upon them." (quoting *Leviticus* 20:13)).

107. ALA. CODE § 13A-6-659(a)(3) (1982); ARIZ. REV. STAT. §§ 13-1411-1412 (1989); ARK. CODE ANN. § 5-14-22 (Michie 1993); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3535 (1988); LA. REV. STAT. ANN. § 14:89 (West 1986); MICH. COMP. LAWS § 28.355 (1990); MINN. STAT. § 609.293 (1987); MISS. CODE ANN. § 97-29-59 (1994); MO. REV. STAT. § 566.090 (1979); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. tit. 21, § 886 (1983); R.I. GEN. LAWS § 11-10-1 (1994); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. § 21.06 (West 1994); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18-2-361 (Michie 1988). Of the states criminalizing sodomy, the following criminalize only same-sex sodomy: ARK. CODE ANN. § 5-14-22; KAN. STAT. ANN. § 21-3535; MO. REV. STAT. § 566.090; TENN. CODE ANN. § 39-13-510; TEX. PENAL CODE ANN. § 21.06.

108. 478 U.S. 186 (1986).

109. *Id.* at 192.

110. *Id.* at 188 (citing GA. CODE ANN. § 16-6-2).

111. *Id.* at 192 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)). The Court also noted that in 1961 all 50 states outlawed sodomy, and in 1986, 24 states and the District of Columbia continued to provide criminal penalties for sodomy performed in private. *Id.* at 192-94. The current trend is away from criminalization of sodomy. Primarily, the Model Penal Code incorporated the recommendation of the American Law Institute and decriminalized sodomy. MODEL PENAL CODE § 213.2 (1962). In addition, two states have determined that criminalization of sodomy violated their state constitutions. See *People v. Onofre*, 415 N.E.2d 936, 939 (N.Y. 1980) (holding that the state may not prosecute acts of consensual sodomy between consenting adults in a private noncommercial setting under the New York Constitution); *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (finding a violation of the Pennsylvania Constitution because the statutory prohibition of consensual sodomy forces the majority's notion of morality on persons whose conduct does not harm others). In addition, there is the issue of whether *Bowers* is even good law following the Court's decision in *Romers*. See *Romers v. Evans*, 116 S. Ct. 1620, 1628 (1996) (stating that laws directed at homosexuals are based on animus toward that group and thus are unconstitutional). The obvious trend away from criminalization of sodomy calls into question the legitimacy of this public policy rationale. At the very least, the trend away from criminalization of sodomy illustrates that in the future such a rationale will likely fail.

112. *Bowers*, 478 U.S. at 191.

While criminalization of homosexual relations and the Judeo-Christian disapproval of homosexuality would weigh against recognition, proponents of same-sex marriages argue that this is not conclusive evidence of the existence a strong public policy. Primarily, use of a sodomy statute and Judeo-Christian beliefs to justify the public policy rationale of *Pacific* assumes that the parties to a same-sex marriage are homosexual. As the Hawaii Supreme Court noted in *Baehr*, simply because a couple is of the same sex does not necessarily mean the couple is homosexual because couples wed for a variety of reasons.<sup>113</sup> For example, in *Adams v. Howerton*,<sup>114</sup> a male immigrant attempted to marry another man in order to qualify as a spouse for immigration purposes.<sup>115</sup> Moreover, the fact that a married couple is of the same sex does not imply that the couple engages in any sexual activity proscribed by a sodomy statute.<sup>116</sup> Furthermore, application of sodomy statutes to same-sex married couples would likely violate the privacy rights of the married couple.<sup>117</sup> Finally, the Supreme Court has rejected the contention that Judeo-Christian beliefs may be used to justify statutory discrimination.<sup>118</sup>

Opponents of same-sex marriages also rely on legislative enactments and case law illustrating the existence of a strong public policy weighing against recognition. Attorney generals of several states have issued opinions disapproving of same-sex marriages on legal grounds.<sup>119</sup> In addition, the legislators of eighteen states have enacted

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113. *Baehr v. Lewin*, 852 P.2d 44, 51 n.11 (1993), *remanded sub nom.*, *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

114. 673 F.2d 1036 (9th Cir. 1982).

115. *Id.* at 1038.

116. *Id.*; *cf.* *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996) (finding that a statement of homosexuality implies that a person engages in or has desire to engage in homosexual conduct in the context of the military's "Don't Ask, Don't Tell" policy); *Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) (en banc) (reasoning that the military has the right to assume that a service member's admission of homosexuality can be interpreted as an admission to past homosexual acts or future, contemplated homosexual acts); *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir. 1991) (finding that private correspondence of bisexuality can be conclusive that a service member is bisexual); *Ben-Shalom v. Marsh*, 881 F.2d 454, 460 (7th Cir. 1989) (holding that the plaintiff's admission that she is a homosexual implies a desire to commit homosexual acts); *see also* *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) ("[T]o pretend homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd").

117. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding a violation of the constitutional right to privacy where a statute prohibiting the use of contraceptives was applied to a married couple).

118. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (rejecting the contention that because God "separated the races . . . he did not intend for the races to mix").

119. 190 Op. Ala. Att'y Gen. 30 (1983); 1995 Op. Alaska Att'y Gen. 69 (1995); Op. Ark. Att'y Gen. No. 95-062 (Apr. 1995); 93 Op. Idaho Att'y Gen. 119 (1993); Op. Kansas Att'y Gen. No. 77-247 (Aug. 1977); Op. La. Att'y Gen. No. 92-699LA (Dec. 1992); Op. Maine Att'y Gen. No.

legislation which forbids the granting of marriage right to same-sex couples.<sup>120</sup> Finally, the case law of several states indicates that the right to marry within the state does not extend to same-sex couples.<sup>121</sup> For example, in *Baker v. Nelson*,<sup>122</sup> the first case to challenge the prohibition against same-sex marriages, two men filed suit on statutory and constitutional grounds after the State of Minnesota refused to grant them a marriage license.<sup>123</sup> The Minnesota Supreme Court held that although the statute did not contain an explicit prohibition against same-sex marriage, the legislature did not intend to permit such marriages.<sup>124</sup> The court emphasized the frequent statutory references to "bride and groom" and "husband and wife."<sup>125</sup> In addition, the court noted the purpose of marriage was procreation.<sup>126</sup> The court concluded that unlike the impermissible marital restriction in *Loving v. Virginia*, the state restriction on marriage was based on a "fundamental difference in sex" and was therefore constitutionally permissible.<sup>127</sup>

Similarly, in *Adams v. Howerton*,<sup>128</sup> an immigrant attempted to marry another man in order to qualify as a spouse for immigration purposes.<sup>129</sup> The court relied heavily on the "recognized definition" of marriage and concluded that no constitutional issues were even im-

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84-28 (Oct. 1984); Op. Mo. Att'y Gen. No. 203-96 (June 1996); 77 Op. Neb. Att'y Gen. 170 (June 1977); Op. Neb. Att'y Gen. No. 96090 (Dec. 1996); Op. Neb. Att'y Gen. No. 97027 (Apr. 1997); Op. S.C. Att'y Gen. (Aug. 12, 1997); Op. S.C. Att'y Gen. (Oct. 17, 1983); Op. S.C. Att'y Gen. (Apr. 11, 1996); Op. Tenn. Att'y Gen. No. 88-43 (Feb. 1988); Op. Tenn. Att'y Gen. No. 94-001 (Jan. 1994); Op. Tenn. Att'y Gen. No. 96-1016 (Feb. 1996); 1994 Op. Va. Att'y Gen. 60 (1994).

120. The following states have enacted legislation stating that they will not recognize same-sex marriages: 1996 ALASKA SESS. LAWS 21; ARIZ. REV. STAT. ANN. § 25-101(c) (West 1996); CONN. GEN. STAT. § 46a-91r (West 1995); H.B. 503, 138th Leg. (Del. 1995); GA. CODE ANN. § 19-3-3.1 (1996); HAW. REV. STAT. ANN. § 572-1 (Michie 1997); IDAHO CODE § 32-209 (1996); 750 ILL. COMP. STAT. 5/212 (West 1996); IND. CODE § 31-7-1-2 (1995); S.B. 515, 76th Leg. (Kan. 1996); H.B. 5662, 88th Leg. (Mich. 1995); S.B. 937, 88th Leg. (Mich. 1995); 1995 N.C. SESS. LAWS 588; S.B. 73, 45th Leg. (Okla. 1996); 23 PA. C.S.A. § 1704 (1996); H.B. 4502, 111th Leg. (S.C. 1996); S.D. CODIFIED LAWS § 25-1-1 (Michie 1996); ; TENN. CODE ANN. 336-3-113 (1996); TEX. CODE ANN. § 68-11-90 (West 1996); UTAH CODE ANN. § 30-1-4 (1995); UTAH CODE ANN. § 30-1-2 (1994); VA. CODE ANN. § 20-45.2 (Michie 1994).

121. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

122. 191 N.W.2d 185 (Minn. 1971).

123. *Id.* at 186.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 187 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

128. 673 F.2d 1036 (9th Cir. 1982).

129. *Id.* at 1038.

plicated in the case.<sup>130</sup> And in *Anonymous v. Anonymous*,<sup>131</sup> where a male plaintiff had unknowingly married a transvestite, thinking "he" was female, the court concluded: "Marriage is and always has been a contract between a man and a woman."<sup>132</sup> Thus, the court concluded that New York would not recognize same-sex marriages.<sup>133</sup> While same-sex couples could argue that these cases merely reflect the previously discussed grounds for invalidating same-sex marriages, these cases nevertheless would be persuasive in determining whether a public policy against same-sex marriages exists.

The numerous bases on which a state could find the existence of a public policy against same-sex marriages illustrate the difficulty a same-sex couple would face in getting their validly contracted marriage recognized in sister-states. Even supporters of DOMA feel that a state already has the right to refuse interstate recognition of same-sex marriages.<sup>134</sup> Therefore, while invocation of the public policy exception of the Full Faith and Credit Clause is not conclusive, same-sex couples will face an uphill battle when attempting to have sister-states recognize their out-of-state marriages.

### C. *The Importance of the Right to Marry*

Whether DOMA will withstand constitutional scrutiny is especially important for same-sex couples because the fundamental right to marry is implicated. As early as 1888, in *Maynard v. Hill*,<sup>135</sup> the Supreme Court stated that marriage is "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>136</sup> In 1923 the Court in *Meyer v. Nebraska*<sup>137</sup> described marriage as "essential to the orderly pursuit of happiness by free men."<sup>138</sup> Then, in 1942, the Court in *Skinner v. Oklahoma*<sup>139</sup> described marriage as "fundamental to the

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130. *Id.*

131. 325 N.Y.2d 499 (1971).

132. *Id.* at 500.

133. *Id.* But cf. *Braschi v. Stahl Assocs.*, 544 N.Y.S.2d 784, 788-89 (Sup. Ct. 1989) (using a broad definition of the family to allow a homosexual man the possibility of succession to his lover's rent-controlled apartment).

134. H.R. Rep. No. 104-664, at 25 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2930.

135. 125 U.S. 190 (1888) (examining a property dispute between spouses where the wife was notified that her husband had been granted a legislative divorce).

136. *Id.* at 194.

137. 262 U.S. 390 (1923) (striking down a state law prohibiting teaching of a foreign language to children).

138. *Id.* at 399.

139. 316 U.S. 535 (1942) (invalidating an Oklahoma statute providing for sterilization of habitual criminals).



very existence and survival of the race.”<sup>140</sup> In 1965, in *Griswold v. Connecticut*,<sup>141</sup> the Court explained the fundamental importance of marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>142</sup>

Thus, the Supreme Court has long recognized the important role of marriage in our society.

In 1967, the Court in *Loving v. Virginia*<sup>143</sup> recognized marriage as a fundamental right under the Constitution.<sup>144</sup> There, the defendants had violated Virginia’s anti-miscegenation statute by marrying in Maryland and moving back to Virginia.<sup>145</sup> The defendants appealed their convictions to the Supreme Court, which subsequently struck down the anti-miscegenation statute on both Equal Protection and Due Process Grounds.<sup>146</sup> The Court declared that marriage is “one of the basic civil rights of man, fundamental to our very existence and survival.”<sup>147</sup> Thus, *Loving* established that the right to marry is a fundamental right.

In 1978, the Court in *Zablocki v. Redhail*<sup>148</sup> extended the *Loving* holding to non-racial cases.<sup>149</sup> There, a Wisconsin statute was at issue.<sup>150</sup> The statute had deprived the petitioner of the right to obtain a marriage license due to his inability to pay his outstanding child support obligations.<sup>151</sup> The Court struck down the statute as unconstitu-

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140. *Id.* at 541.

141. 381 U.S. 479 (1965) (striking down a statute forbidding the use of contraceptives as a violation of the right to marital privacy).

142. *Id.* at 486.

143. 388 U.S. 1 (1967) (invalidating a Virginia statute that prohibited interracial marriages).

144. *Id.* at 3.

145. *Id.*

146. *Id.* at 12; see also U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

147. *Loving*, 388 U.S. at 3 (finding that the right to marry is a fundamental right subject to strict scrutiny).

148. 434 U.S. 374 (1965) (striking down a Wisconsin statute that prohibited the marriage of a non-custodial parent without court approval as a violation of the Equal Protection Clause).

149. *Id.* at 384.

150. *Id.*

151. *Id.*

tional and held: "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."<sup>152</sup> *Zablocki* reaffirmed that the right to marry extends to all individuals. Therefore, Supreme Court precedent recognizes that marriage is a fundamental right for all individuals.

In addition to the fundamental nature of the right to marry, the multiple benefits attached to the marital union make the right to marry of paramount concern for same-sex couples. Some 1,049 federal statutes grant benefits to persons based on their marital status.<sup>153</sup> These benefits include the following: bankruptcy protection,<sup>154</sup> burial rights,<sup>155</sup> medical benefits,<sup>156</sup> pension benefits,<sup>157</sup> welfare benefits,<sup>158</sup> government education loans,<sup>159</sup> preferential tax treatment,<sup>160</sup> surviving spouse rights relating to veterans benefits,<sup>161</sup> copyright protection,<sup>162</sup> and social security benefits.<sup>163</sup>

Additionally, many state benefits are contingent upon the marital status of an individual. Examples include: (1) inheritance rights such as notice, protection, benefits, dower, and curtesy;<sup>164</sup> (2) health benefits, including insurance coverage, next-of-kin status, public assistance, and exemptions relating to state health departments;<sup>165</sup> (3) post-divorce rights, including spousal support and property division;<sup>166</sup> (4) ability to exempt real property from attachment or execution;<sup>167</sup> (5)

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152. *Id.*

153. Robb, *supra* note 10, at 263.

154. 11 U.S.C. § 507(a)(7) (1994) (granting bankruptcy protection for debts of spouses and former spouses).

155. 38 U.S.C. § 2405(5) (1994) (discussing rights to maintenance of burial plots for veterans).

156. 42 U.S.C. § 426 (1994) (granting hospital insurance benefits to spouses of eligible individuals).

157. 5 U.S.C. § 8339(j) (1994) (stating that the survivor annuity is affected by one's marital status).

158. 42 U.S.C. § 1382(b) (noting that the amount of social security benefits was conditioned upon one's marital status).

159. 20 U.S.C. §§ 1087nn(b)(1)(A), 1087pp (1994) (basing government loans upon expected family contribution).

160. 26 U.S.C. § 6013 (1994) (allowing a husband and wife to file joint tax returns).

161. 38 U.S.C. § 3712(a)(4)(A)(vi)(III), (C) (1994) (granting surviving spouses of veterans housing benefits to which the veteran was entitled); *id.* §§ 3501, 3511 (giving surviving spouses of veterans financial assistance for educational programs).

162. 17 U.S.C. §§ 101, 304(c)(2) (1994) (granting copyright protection for all works of art created by deceased spouse to widow[er]).

163. 42 U.S.C. § 402(b), (c), (e), (f) (granting a surviving spouse death benefits).

164. Cordell, *supra* note 75, at 255 n.52-54 (citing UNIF. PROBATE CODE (1985); HAW. REV. STAT. §§ 533, 560 (1985 and Supp. 1992)).

165. *Id.* at 255 n.55 (citing HAW. REV. STAT. § 346).

166. *Id.* at 256 n.56-61 (citing HAW. REV. STAT. §§ 572, 575, 580).

167. *Id.* at 256 n.62 (citing HAW. REV. STAT. § 651).

the right to bring a wrongful-death suit;<sup>168</sup> (6) housing rights;<sup>169</sup> and (7) guardianship rights.<sup>170</sup> Finally, a number of private benefits are attached to marital status such as insurance coverage on car rentals and announcements of marriage and engagement in newspapers.<sup>171</sup> Given the numerous benefits attached to the marital union and the fundamental nature of the right to marry, the right of a same-sex couple to wed is of utmost importance to those individuals.

#### *D. Statutory Mechanisms Regarding Interstate Recognition of Marriages*

Both the Restatement (Second) of Conflict of Laws<sup>172</sup> and the Uniform Marriage and Divorce Act ("UMDA")<sup>173</sup> establish statutory guidelines for interstate recognition of marriages.<sup>174</sup> Both set forth the general rule of *lex celebrationis*—a marriage valid in the state where celebrated is valid in all sister states. Subpart I.D.1 presents the Restatement approach to the interstate recognition of marriages.<sup>175</sup> Subpart I.D.2 analyzes the approach of UMDA.

##### *1. The Restatement (Second) of Conflict of Laws*

The majority of the states have adopted the approach of the Restatement,<sup>176</sup> which establishes that a marriage validly entered into will be valid in all other states absent the violation of a strong public policy.<sup>177</sup> Section 283 sets forth the general rule of validity:

168. *Id.* at 256 n.63 (citing HAW. REV. STAT. § 663).

169. See *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1613 (1989) (noting that many zoning ordinances limit multi-person dwellings to a family defined as a husband, wife, and their immediate and extended families).

170. See *In re Guardianship of Sharon Kowlaski*, 478 N.W.2d 790, 791-92 (Minn. Ct. App. 1991) (granting guardianship rights to the parent of an injured woman rather than to the woman's same-sex partner).

171. Cordell, *supra* note 75, at 257 n.64-65 (citations omitted).

172. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1988).

173. UNIF. MARRIAGE & DIVORCE ACT § 210 (1973).

174. See *id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283; see also *Hadix v. Johnson*, 933 F. Supp. 1362, 1367 (W.D. Mich. 1996) (holding that Congress usurped an "exclusively judicial" role in enacting the Prison Litigation Reform Act, because it obviates the "most basic power of the Judiciary's power under Article III," the need for a "case-by-case determination").

175. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283; UNIF. MARRIAGE & DIVORCE ACT § 210.

176. *Loughran v. Loughran*, 292 U.S. 216, 223 (1994); *Vandever v. Industrial Comm'n*, 714 P.2d 866, 869 (Ariz. Ct. App. 1985); *State v. Graves*, 307 S.W.2d 545, 547 (Ark. 1957); *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952); *Meisenhelder v. Chicago & N.W. Ry.*, 213 N.W. 32, 33 (Minn. 1927); *Bucca v. State*, 128 A.2d 506, 508 (N.J. Super. Ct. Ch. Div. 1957); *Leszinske v. Poole*, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990); *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953).

177. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283.

(1) The validity of a marriage will be determined by the local law of the state, which with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be valid unless it violates the strong public policy of another state which had the most significant relationship to the spouse and the marriage at the time of the marriage.<sup>178</sup>

Thus, marriages are generally upheld absent a violation of a strong public policy in the state that has the most significant relationship to the couple.

To meet the requirements of section 283, three prerequisites must be satisfied. First, it must be determined whether the marriage satisfies the ceremonial requirements of the state where the marriage was contracted, that is, it must be determined that the marriage is valid.<sup>179</sup>

Second, it must be determined which state has the most significant relationship with respect to the particular issue.<sup>180</sup> In making this determination, the Restatement focuses on: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied.<sup>181</sup> Of these factors, the Restatement emphasizes the importance of maximizing predictability and uniformity, and the need to ensure the implementation of the relevant policies of the state with the dominant interest in the determination of the particular issue.<sup>182</sup> The state with the most significant relationship to the newly married couple is, thus, determined from balancing all the relevant competing factors.<sup>183</sup>

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178. *Id.*

179. *Id.* § 283(2).

180. *Id.* The Restatement's "most significant relationship" test follows the general rules established in making choice of law decisions. See Douglas Laylock, Comment, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 255 (1992) (noting that choice of law issues are generally resolved so that the state that has the most "significant contact or significant aggregation of contacts" with the parties before the court is the state whose law is applied (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981))).

181. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (incorporated by reference into § 283(1)).

182. *Id.* § 283 cmt. b.

183. *Id.*

Third, it must be determined whether recognition of the marriage would violate a strong public policy of the state with the most significant relationship.<sup>184</sup> In reaching this determination, courts look to state statutes that define the criteria for invalidation of extra-state marriages.<sup>185</sup> These statutes prohibit two types of marriages: those entered in other states solely to avoid the couple's resident state laws,<sup>186</sup> and those between close family members.<sup>187</sup> Similarly, statutes prohibiting same-sex marriages could also be considered under this prong of the Restatement's inquiry.<sup>188</sup>

In determining whether recognition of the marriage would violate the strong public policy of the state, a court may also consult the state's case law.<sup>189</sup> Generally, cases have invalidated only those marriages involving incest, minors, remarriage before a finalized divorce proceeding, or polygamy.<sup>190</sup> In the same-sex marriage context, there

184. *Id.*

185. *Id.* § 283 cmt. k.

186. See UNIF. MARRIAGE EVASION ACT XXI (1957).

187. See Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 921. Marriages that are prohibited under these laws include those between: (1) parents and children, (2) grandparents and grandchildren of every degree, (3) brothers and sisters (both whole and half-blood), (4) uncles and aunts and their nieces and nephews, and (5) first cousins. *Id.*

188. For a list of the states with statutes denying recognition to same-sex marriages, see *supra* note 120.

189. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283.

190. See D'Amato, *supra* note 187, at 918-21 (citing *Osoinach v. Watkins*, 180 So. 557 (Ala. 1938) (denying recognition to an out-of-state marriage that violated a prohibition against incestuous marriages); *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961) (denying recognition to an incestuous marriage); *Smith v. Smith*, 11 S.E. 496 (Ga. 1890) (refusing to recognize a marriage where the marriage would be invalid under state law due to the couple's age); *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958) (refusing to recognize a marriage where the marriage would be invalid under state law due to the couple's age); *Bucca v. State*, 128 A.2d 506 (N.J. Super. Ct. Ch. Div. 1957) (denying recognition to an incestuous marriage); *Ross v. Bryant*, 217 P.2d 364 (Okla. 1923) (refusing to recognize a marriage where the marriage would be invalid under state law due to the couple's age); *Johnson v. Johnson*, 106 P. 500 (Wash. 1910) (denying validity of a marriage which was incestuous)). But cf. D'Amato, *supra* note 187, at 917-21 (citing *Etheridge v. Shaddock*, 706 S.W.2d 395 (Ark. 1986) (recognizing as valid a marriage between first cousins when performed in a state allowing such marriages, although such marriage could not be entered into in Arkansas); *State v. Graves*, 307 S.W.2d 545 (Ark. 1957) (recognizing a marriage as valid where the couple would be prevented from marrying under Arkansas law due to age); *Osburn v. Graves*, 210 S.W.2d 496, 498 (Ark. 1948) (recognizing a common-law marriage entered into in a sister state because "to do otherwise there would inevitably be a denial of the Full Faith and Credit Clause"); *McDonald v. McDonald*, 58 P.2d 163 (Cal. 1936) (validating a marriage although the couple married at an age younger than that allowed in the state); *Spencer v. People*, 292 P.2d 971 (Colo. 1956) (en banc) (recognizing a marriage as valid where the couple would be prevented from marrying under Colorado law due to their age); *Mangrum v. Mangrum*, 220 S.W.2d 406 (Ky. Ct. App. 1949) (recognizing a marriage as valid where the couple would be prevented from marrying under Kentucky law due to their age); *In re Millers' Estate*, 214 N.W. 428 (Mich. 1927) (recognizing a marriage between first cousins although Michigan law prohib-

have been no cases addressing interstate recognition of same-sex marriages, because no couple has yet to be married subsequent to the *Baehr* decision.<sup>191</sup>

In addition to case law, courts may unilaterally determine that a violation, not yet addressed by any case or statute, is still sufficiently strong to create a strong public policy that necessitates the marriage not being recognized.<sup>192</sup> This inquiry could also be relevant in the same-sex marriage context. No case law has yet addressed interstate recognition of same-sex marriages. Moreover, only a minority of the states have enacted statutes banning recognition of same-sex marriages.<sup>193</sup> Thus, without case law or a legislative determination upon which to base non-recognition of a same-sex marriage, courts may be forced to invoke this portion of the Restatement's inquiry. In conclusion, under the Restatement approach, absent a strong public policy necessitating invalidation, the marriage will be upheld as valid.

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ited such marriages); *Ma v. Ma*, 483 N.W.2d 732, 735 (Minn. Ct. App. 1992) (finding that a valid Chinese marriage was enforceable in Minnesota despite the fact that such a marriage did not meet the procedural requirements for a ceremonial marriage in Minnesota, because a valid Chinese marriage does not violate the public policy of Minnesota); *Lawszinske v. Poole*, 798 P.2d 1049 (N.M. Ct. App. 1990) (recognizing a marriage between an uncle and a niece entered into in Costa Rica although such marriages were forbidden in New Mexico); *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (upholding a marriage between an uncle and a niece); *Hilliard v. Hilliard*, 209 N.Y.S.2d 132 (Sup. Ct. 1960) (recognizing a marriage as valid where the couple would be prevented from marrying under New York law due to age); *Campione v. Campione*, 107 N.Y.S.2d 170 (Sup. Ct. 1951) (recognizing as valid a marriage between an uncle and a niece entered into in Italy); *Mazzoline v. Mazzoline*, 155 N.E.2d 206 (Ohio 1958) (validating a marriage between first cousins although such marriages are invalid under Ohio law)).

191. While no state court has yet addressed a case involving recognition of an extra-state, same-sex marriage, several courts have rejected the contention that a right to marry exists under the various states' laws or constitutions. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (refusing to recognize same-sex marriage as valid for purposes of immigration); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (holding that the right for same-sex couples to marry was not protected by the Fourteenth Amendment Due Process Clause nor by the District of Columbia marriage statute); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (holding that the United States Constitution does not sanction or protect the right to marry between same-sex couples); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (rejecting the contention that the limitation of the right to marry for different-sex couples resulted in a violation of the First, Eighth, Ninth, or Fourteenth Amendments to United States Constitution); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971) (refusing to recognize same-sex marriage); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (refusing to grant a same-sex couple divorce, because same-sex couples could not enter common-law marriage); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the denial of the right to marry for same-sex couples did not deny equal protection of the laws). States may assert that this case law is relevant in the inquiry set forth in section 283 of the Restatement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283.

192. D'Amato, *supra* note 187, at 923.

193. See *supra* note 120.

## 2. *The Uniform Marriage and Divorce Act*

The Uniform Marriage and Divorce Act<sup>194</sup> also sets up a framework for determining the validity of marriages contracted outside of the state in which recognition is sought. UMDA focuses upon the need to promote marital stability between states.<sup>195</sup> Eight states have adopted UMDA: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.<sup>196</sup> Section 210 of UMDA provides that:

All marriages contracted within this State prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State.<sup>197</sup>

The only exceptions UMDA gives to mandated recognition are polygamous and incestuous marriages.<sup>198</sup> UMDA "expressly fails to incorporate the 'strong public policy' exception of the Restatement [(Second) of Conflict of Laws]."<sup>199</sup> The Restatement's public policy exception was not incorporated in order to "preclude invalidation of many marriages which would have been invalidated in the past."<sup>200</sup>

Same-sex marriage proponents could argue that because UMDA fails to list same-sex marriages as an exception to mandated recognition, that recognition of a validly contracted same-sex marriage is mandated. However, despite the statutory language to the contrary, it is clear that States that have adopted UMDA, like the states that have adopted the Restatement, nevertheless retain the right to deny recognition based on public policy grounds.<sup>201</sup> Additionally, while UMDA does not list a same-sex marriage as one in which recognition is not required, same-sex marriages were not yet recognized when the last version of UMDA was adopted in 1973.<sup>202</sup> Therefore, same-sex marriage opponents have a strong argument that an exception was not

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194. UNIF. MARRIAGE & DIVORCE ACT § 210 (1973).

195. *Id.*

196. Harold P. Schombert, Note, Baehr v. Lewin: *How Far Has the Door Been Opened? Finding a State Policy for Recognizing Same-Sex Marriages*, 16 WOMEN'S RTS. L. REP. 331, 345 n.34 (1995).

197. *Id.* at 345.

198. UNIF. MARRIAGE & DIVORCE ACT § 210.

199. *Id.* § 210 cmt.

200. *Id.*

201. See Barbara J. Cox, *Same-Sex Marriages and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1070-71 ("[E]ven states with validation statutes may turn to public policy to determine whether [a same-sex] couple's marriage would be valid.").

202. UNIF. MARRIAGE & DIVORCE ACT § 210.

included because same-sex marriages were not yet validly recognized in any state.

## II. ANALYSIS

Congress's declaration via DOMA that states need not recognize same-sex marriages validly contracted in a sister state rescinds the operation of the Full Faith and Credit Clause in the area of interstate recognition of same-sex marriages. The text and history of the Full Faith and Credit Clause and the Supreme Court cases interpreting the requirements of the Full Faith and Credit Clause amply illustrate that Congress's action was unwarranted, unprecedented and unconstitutional.

This subpart illustrates the reasons why DOMA is fatally deficient under the Full Faith and Credit Clause of the Constitution. Subpart III.A analyzes Congress's authority to pass DOMA and concludes that Congress failed to abide by the requirements of the Full Faith and Credit Clause when it passed DOMA. Subpart III.B explains that Congress's action via DOMA was unnecessary because the current statutory mechanisms governing the interstate recognition of marriages, the Restatement and UMDA, offer adequate protection to the states. Finally, subpart III.C briefly presents the other constitutional provisions potentially violated by the passage of DOMA.

### A. *DOMA Violates the Full Faith and Credit Clause*

DOMA represents an unprecedented exercise of congressional authority under Article IV. Prior congressional actions taken pursuant to Article IV have always given effect to the Full Faith and Credit Clause in a particular area. Congress's first and second exercises of its legislative power under Article IV, the Full Faith and Credit Act of 1790 and the subsequent amendment in 1804, assure that the Full Faith and Credit Clause will be given effect in interstate recognition of acts, records, and judicial proceedings. Indeed, the language of the Full Faith and Credit Act mirrors the language of the Full Faith and Credit Clause.

Similarly, PKPA, the Full Faith and Credit for Child Support Orders of 1994 Act, and the Safe Homes for Women Act of 1994 all represent positive enactments of Congress's Article IV power. PKPA was passed to assure child custody determinations would be honored in sister states; the Full Faith and Credit for Child Support Orders of 1994 Act was passed to assure child support orders would be honored in sister states; and the Safe Homes for Women Act of 1994 was



designed to assure that sister states would honor protection orders issued by sister states.

In marked contrast to these prior congressional statutes passed pursuant to the Full Faith and Credit Clause, DOMA represents an exercise of Congress's Article IV power to *not* give effect to the Full Faith and Credit Clause in a specific area, that of same-sex-marriages. The congressional record of DOMA reveals that it was Congress's specific intent that no state would "be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize [a same-sex marriage]." <sup>203</sup> To effectuate this congressional intent, Congress enacted section 2 of DOMA which authorizes states to ignore the Full Faith and Credit Clause in determining whether to grant recognition to an out-of-state same-sex marriage.

The enactment of section 2 created a statutory exception to the constitutional mandate of Article IV. The language of the Full Faith and Credit Act and the Full Faith and Credit Clause are identical; thus, it is clear that DOMA implicates both the Full Faith and Credit Clause and the Full Faith and Credit Act equally. <sup>204</sup> While Congress has the authority to pass legislation enforcing the Full Faith and Credit Clause under Article IV, the Supreme Court has considered two of the statutory exercises of Congress's Article IV power, the Full Faith and Credit Acts and PKPA, to be mere addenda to the Full Faith and Credit Clause. <sup>205</sup> The Court reasoned that the Full Faith and Credit Act and PKPA were addendums to the Full Faith and Credit Clause since those acts' language mirrored the language of the clause. <sup>206</sup> While the Court has not yet addressed the constitutional effect of either the Full Faith and Credit for Child Support Orders Act of 1994 or the Safe Homes for Women Act of 1994, it is likely that these acts, like the Full Faith and Credit Act and PKPA, would be seen as addenda to the Full Faith and Credit Clause, since these acts have language mirroring the clause. In contrast to these acts which are mere addenda to the Full Faith and Credit Clause, DOMA's language removes the protection of the clause in the area of same-sex marriages. By passing DOMA, therefore, Congress has, for the first time, enacted legislation removing the constitutional right given by the clause.

Analysis of the text and history of Article IV reveal that Congress exceeded its Article IV power when it created a statutory exception to

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203. H.R. REP. NO. 104-664, at 105 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

204. *See supra* notes 16-24 and accompanying text.

205. U.S. CONST. art. IV; *see supra* notes 16-24 and accompanying text.

206. *See supra* notes 16-24 and accompanying text.

the Full Faith and Credit Clause. While the Effects Clause empowers Congress “by general Laws [to] prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof,” Congress is bound by the first clause of Article IV which states that “full faith and credit *shall* be given in each state to the public acts, records and judicial proceedings.”<sup>207</sup> The *shall* language utilized in Article IV represents a congressional mandate that full faith and credit be given to sister states acts, records, and judicial proceedings.

Despite the clear wording of Article IV, DOMA proponents contend the effects clause encompasses an implicit congressional power to remove the operation of the Full Faith and Credit Clause.<sup>208</sup> In support of this contention, DOMA proponents cite PKPA as precedent. However, in contrast to DOMA which was intended to remove the operation of the Full Faith and Credit Clause, PKPA was intended to assure the operation of Article IV. Congress passed PKPA because of the refusal of many states to recognize the valid child custody orders of sister states. The diametrically opposed congressional purposes reveal that analogy to PKPA is unpersuasive.

Additionally, the Supreme Court’s interpretation of PKPA reveals that it cannot provide support for DOMA. In *Thomas*, the Court recognized that PKPA imposed no substantive demands beyond that imposed by the Full Faith and Credit Clause.<sup>209</sup> Thus, PKPA was held to merely reiterate the requirements of Article IV.<sup>210</sup> DOMA, in contrast to PKPA, removes the requirement of the Full Faith and Credit Clause. Therefore, PKPA does not provide a basis for Congress’s actions.

Furthermore, the contention that Article IV contains an implicit power to remove the requirements of the Full Faith and Credit Clause is undermined by a comparison of Congress’s Article IV power to Congress’s enumerated powers. Article I, section 8, sets forth numerous distinct powers given to Congress including such specific powers as the power to coin money and to grant letters of marque and reprisal.<sup>211</sup> None of these enumerated powers include the right to rescind the application of the Full Faith and Credit Clause, nor can an implicit power be implied. In *Thomas*, the Court recognized that Congress

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207. U.S. CONST. art. IV, § 1 (emphasis added).

208. In the congressional record of DOMA, Congress stated it “retains a discretionary power to carve out such exceptions as it deems appropriate.” H.R. REP. NO. 104-664, at 105.

209. See *infra* notes 211-15 and accompanying text.

210. See *infra* notes 211-15 and accompanying text.

211. U.S. CONST. art. IV, § 8.

clearly had the power to increase the measure of faith and credit that a state must accord to the laws or judgments of another state.<sup>212</sup> The Court did not answer the question whether or not Congress could cut back on the measure of faith and credit required by the Full Faith and Credit Clause.<sup>213</sup> *Thomas*, therefore, suggests that the Effects Clause does not encompass a power to deny full faith and credit to valid state judgments. This reading of *Thomas* is consistent with the Court's decision in *Katzenbach v. Morgan*<sup>214</sup> where the Court held that article five of the Fourteenth Amendment did not authorize Congress to remove its constitutional protection.<sup>215</sup> Like the Fourteenth Amendment, Article IV lacks language authorizing the removal of its constitutional protections. Like the Fourteenth Amendment, Article IV's powers are a constitutional mandate. Since the Constitution does not specifically grant Congress the power to remove the Full Faith and Credit Clause's mandate, and since the Effects Clause of the Full Faith and Credit Clause (like section five of the Fourteenth Amendment) does not grant Congress the specific power to remove its protection, it is unlikely that such a power exists.

Proponents of DOMA may also argue that DOMA does nothing more than recognize the traditional state dominance in domestic relations. This argument is likewise unpersuasive. In *Sherrer*, Massachusetts utilized that same argument to avoid application of a Florida divorce decree.<sup>216</sup> The Court quickly rejected the contention that the Full Faith and Credit Clause lacked force due to a domestic relations issue being involved.<sup>217</sup> The Court noted that the Full Faith and Credit Clause was expressly enacted to assure that Florida's "vital interest" in having its divorce decree honored was protected.<sup>218</sup> Just as the state in *Sherrer* had a vital interest in maintaining the legitimacy of its divorce decree, a state granting a marriage license to a same-sex couple has a vital interest in assuring that marital union is recognized by other states.<sup>219</sup> Traditional state dominance of marital relations, therefore, cannot justify DOMA's legislative pronouncement that same-sex marriages need not be recognized.

Equally unpersuasive is the contention that DOMA can be justified as a Court recognized exception to the Full Faith and Credit Clause.

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212. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980).

213. *Id.*

214. 384 U.S. 641 (1966).

215. *Id.* at 651 n.10.

216. *Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948).

217. *Id.*

218. *Id.*

219. *Id.*

The Supreme Court has frequently stated: "Constitutionally created rights cannot be abridged by an act of Congress."<sup>220</sup> The Supreme Court has recognized only two instances in which a state may refuse to apply the law of another state without violating the Full Faith and Credit Clause: (1) for laws which impugn a state's public policy;<sup>221</sup> and (2) for laws which are purely procedural.<sup>222</sup> Because same-sex marriages are not a third category from which the Full Faith and Credit Clause has no application, one of these two exceptions *must* apply for DOMA to withstand constitutional scrutiny.

The procedural exception to the requirements of the Full Faith and Credit Clause is not implicated by same-sex marriages. The denial of the right to marry involves a substantive right rather than a procedural right.<sup>223</sup> Because marriage is a substantive and fundamental right, same-sex marriages must, therefore, violate the public policy of the state refusing recognition in order to be consistent with the Court's jurisprudence addressing the Full Faith and Credit Clause.<sup>224</sup>

The public policy exception to the Full Faith and Credit Clause that was set forth in *Pacific* likewise fails to save the constitutionality of DOMA. The public policy exception to the Full Faith and Credit Clause plainly requires a state to determine that recognition of an act or judgment of a sister state would result in the violation of the state's public policy.<sup>225</sup> DOMA, however, removes the requirement that a public policy exist and instead authorizes the states to unilaterally deny recognition to the same-sex marriage. DOMA's abrogation of the necessary finding of a public policy against same-sex marriages makes the public policy exception to the Full Faith and Credit Clause inapplicable, and thereby renders DOMA unconstitutional.

DOMA supporters will likely argue, in order to save the constitutionality of DOMA, that DOMA represents nothing more than a pronouncement that a public policy against same-sex marriages must exist

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220. *Hadix v. Johnson*, 933 F. Supp. 1362, 1369 (W.D. Mich. 1996) (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982)). In *Hadix*, Congress had granted stays under the Prison Reform Litigation Act. *Id.* at 1362. The court held that Congress had usurped a role which was "exclusively judicial," by taking away the "power [from the judiciary] to decide substantive issues of law." *Id.* at 1366.

221. *Pacific Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1953).

222. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 736-37 (1988).

223. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the denial of the right to marry violates a person's substantive rights under the Constitution); *cf.* *Anetekhah v. INS*, 876 F.2d 1218, 1222-23 (5th Cir. 1989) (holding that a procedural limitation of a two-year residency on the right to marry did not violate the Constitution because the parties were not forever deprived of the right to marry).

224. *Pacific*, 306 U.S. at 494.

225. *Id.* at 502-03.

before recognition is denied. DOMA supporters will note that the Court construes statutes in ways to prevent them from being declared unconstitutional and, therefore, would favor a finding of constitutionality for DOMA.<sup>226</sup> Additionally, DOMA supporters will note that one of the purposes of DOMA was to "protect the rights of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."<sup>227</sup> However, this very purpose of DOMA will prevent a finding of constitutionality. While a state may have a strong argument that such a policy exists,<sup>228</sup> the fatal flaw of DOMA lies in the fact that it authorizes states to deny recognition without consideration of any federal constitutional implications. Because DOMA allows states to deny recognition without consideration of the requirements imposed by the Full Faith and Credit Clause, DOMA rescinds the application of Article IV and is, therefore, unconstitutional.

Additionally, DOMA cannot be seen as a congressional determination of the public policy of a state. As the Supreme Court has recognized, the subject of domestic relations, including the marital status of parties, "belongs to the laws of the states and not to the laws of the United States."<sup>229</sup> Accordingly, the determination of whether a public policy against same-sex marriages exists in a state is a judgment reserved to the state rather than to Congress.<sup>230</sup> As an act of Congress, DOMA, therefore, could not constitutionally determine what the public policy of a given state regarding same-sex marriages was without infringing on the sovereignty of the state. Indeed, DOMA does not purport to define the public policy of any state regarding same-sex marriages. Because of this and because DOMA does not require the states to determine, before invoking the law, that a public policy exists against same-sex marriages, DOMA rescinds the operation of the Full Faith Credit Clause and is, therefore, unconstitutional.

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226. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

227. H.R. REP. NO. 104-664, at 105 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

228. *See supra* notes 76-134 and accompanying text.

229. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

230. *See Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 366 (Va. 1939) (noting that a state would be deprived of "the very essence of its sovereignty" if it did not have the ability to determine what laws were "repugnant to its own laws and policy").

DOMA ignores the rationale behind the Full Faith and Credit Clause. The Supreme Court has repeatedly recognized that the framers intended to impose a constitutional directive via the clause to require states to recognize the acts of sister states.<sup>231</sup> The Court has frequently stated that the Framers imposed this constitutional mandate in recognition of the fact that only by requiring states to give full faith and credit to the acts of sister states could the United States be transformed from a collection of individual sovereign states into a cohesive nation.<sup>232</sup> Instead of requiring states to grant comity to the validly contracted same-sex marriages, DOMA rescinds the application of the Full Faith and Credit Clause. In the area of same-sex marriages, DOMA recasts the United States from a cohesive nation into a collection of individual states, each free to give or not give effect to same-sex marriages as it so desires. Because DOMA focuses on the individual desires of each state rather than on the interests of the nation in having the acts of each state recognized throughout the nation, DOMA undermines the purpose of the Full Faith and Credit Clause and should be declared unconstitutional.

### *B. The Passage of DOMA was Unnecessary*

Congress defended its decision to pass DOMA on the grounds that without DOMA states could be required to recognize same-sex marriages validly contracted in sister states by the Full Faith and Credit Clause. Analysis of the current statutory mechanisms governing the interstate recognition of marriages, the Restatement and UMDA, reveal that Congress unnecessarily rescinded the operation of the Full Faith and Credit Clause because both the Restatement and UMDA adequately protect states' rights.<sup>233</sup>

The Restatement protects the interests of the states by allowing states to deny recognition to same-sex marriages. Section 283 of the Restatement contains the public policy exception set forth by the Court in *Pacific*.<sup>234</sup> In order to invoke this exception, the state must first show that it has a significant relationship with the married couple. While the Restatement sets forth seven specific factors to consider in determining the state with the most significant relationship to the

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231. *Estin v. Estin*, 334 U.S. 541, 546 (1948); *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

232. *Estin*, 334 U.S. at 546; *Sherrer*, 334 U.S. at 355; *Milwaukee County*, 296 U.S. at 276-77.

233. Professor Laurence H. Tribe contends that DOMA merely codifies the state's existing ability to deny recognition to same-sex marriages on public policy grounds and, therefore, DOMA is unnecessary. 142 CONG. REC. 55931-01 (daily ed. June 6, 1996) (statement of Professor Laurence H. Tribe).

234. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 (1971).

married couple,<sup>235</sup> the contacts necessary to survive a constitutional challenge have been described as "incidental."<sup>236</sup> If Hawaii or another state recognized a same-sex marriage, therefore, it is clear that the recognizing state could likely satisfy the Restatement requirement that it have the most significant relationship to the married couple. That the state could satisfy this requirement would be especially clear if the same-sex couple resided in the state in which recognition was sought and had merely traveled to the other state in order to be married.

Once a state determined that it had the most significant relationship to the married couple, the state could deny recognition provided it proved the existence of a strong public policy against recognition of the same-sex marriage. The basis of a public policy exception could be invoked on numerous grounds including the traditional role of the male-female marital union, Judeo-Christian beliefs, statutes criminalizing sodomy, statutes prohibiting the recognition of same-sex marriages, and case law stating that the right to same-sex marriages does not exist under state law.<sup>237</sup> While same-sex marriage opponents have meritorious arguments against basing a public policy exception on these grounds, the grounds will provide courts with ample ammunition to determine that a public policy exists. And given the deference accorded states in the domestic relations arena, a reviewing court may likely defer to the finding that a policy exists.

Similarly, although UMDA does not have the public policy exception of the Restatement, it is clear that in states that have adopted UMDA, a public policy exception may nevertheless be utilized to deny recognition to same-sex marriages.<sup>238</sup> Additionally, UMDA states could enact a statutory exception to UMDA and, therefore, same-sex marriages would, like polygamous and incestuous marriages, become an exception to recognition. Thus, UMDA also protects states' rights by allowing them to deny recognition on public policy grounds.

Given the fact that the Restatement and UMDA protect states' rights to deny recognition to same-sex marriages, DOMA unnecessarily rescinds the operation of the Full Faith and Credit Clause. As established in *Pacific*, the mandates of the Full Faith and Credit Clause are met, even where a state denies recognition to the marital union, wherever a strong public policy against recognition exists. The

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235. See *supra* notes 176-93 and accompanying text.

236. H.R. REP. NO. 104-664, at 105 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

237. See *supra* notes 76-134 and accompanying text.

238. See *supra* notes 194-202 and accompanying text.

Restatement and UMDA comply with the mandate of *Pacific* by requiring a strong public policy against recognition be found before recognition is denied.<sup>239</sup> While the existence of a strong public policy is not guaranteed due to the many arguments same-sex couples may assert against such a policy, such is the price of adhering to the Constitution. If a public policy against same-sex marriages is lacking, then the Full Faith and Credit Clause mandates recognition. Therefore, DOMA is both unnecessary and unconstitutional.

### C. Other Constitutional Challenges to the Defense of Marriage Act

In addition, even if the Court were to rule that Congress has not violated the Full Faith and Credit Clause and exceeded its Article IV powers by enacting DOMA, the Act would still need to survive a host of other constitutional challenges in order to be upheld. The rights at issue under DOMA "derive from the most sacred of sources, the Constitution."<sup>240</sup> To deny same-sex couples the right to have their marriages recognized in other states raises due process concerns,<sup>241</sup> equal protection issues,<sup>242</sup> federalism concerns,<sup>243</sup> and invokes an inquiry

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239. See *supra* notes 176-202 and accompanying text.

240. *Hadix v. Johnson*, 933 F. Supp. 1362, 1367 (W.D. Mich. 1996).

241. See U.S. CONST. amend XIV (stating no State shall "deny to any person within its jurisdiction the equal protection of the laws"); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting that marriage is a fundamental right which, if denied, results in a denial of due process).

242. See U.S. CONST. amend XIV (stating that no State shall "deprive any person of life, liberty, or property, without due process of law"); see also *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) (holding that the amendment to Colorado's Constitution that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons from discrimination, violated the Equal Protection Clause, because "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" (citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis added); *Baehr v. Lewin*, 852 P.2d 44, 59 n.19 (Haw. 1993) (noting the compelling reasons for which marriage is prohibited in Hawaii), *remanded sub nom.*, *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir Ct. Dec. 3, 1996).

243. Congress may also have violated federalism principles, because the Supreme Court should be the final arbitrator over the exceptions to the application of the Full Faith and Clause. The United States has a federalist system of government. See *Hadix v. Johnson*, 933 F. Supp. 1362, 1367 (W.D. Mich. 1996) (holding that Congress usurped a role that is "exclusively judicial" by enacting a stay provision under the Prison Litigation Reform Act). This means that the United States is comprised of "a union of states [which] recognizes the sovereignty of a central authority while retaining certain residual powers of government." AMERICAN HERITAGE DICTIONARY 494 (2nd College ed. 1982). The Framers of the Constitution established a federalist structure, because they believed that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 300 (James Madison) (Henry Cabot Lodge ed. 1888). The Framers established a federal government consisting of "three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct" in order to guard against this



into the constitutional right to travel.<sup>244</sup> It is doubtful whether DOMA could survive a constitutional attack on those grounds even if DOMA were found to not violate the Full Faith and Credit Clause.

### III. IMPACT

Whether DOMA is constitutionally sanctioned under the Full Faith and Credit Clause is most important due to the impact a finding of constitutionality would bring. The most important right to same-sex couples is that denied them by DOMA. Not only are same-sex couples denied the fundamental right to marry by DOMA,<sup>245</sup> but they are also denied a host of benefits associated only with the marital union.<sup>246</sup> Moreover, to uphold DOMA sets a dangerous precedent in

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tyranny. *Hadix*, 933 F. Supp. at 1367 (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982)).

Article III of the Constitution sets forth the power of the judicial branch. U.S. CONST. art. III, § 2. These powers include the ability to decide "[c]ontroversies between two or more States." *Id.* In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court held that Article III establishes that the judiciary has the power "to say what the law is." *Id.* at 177. Thus, the judicial branch has the ability to decide all cases and controversies arising under the laws of the United States. U.S. CONST. art. III, § 2.

"When Congress enacts a rule which mandates the outcome of a case, such that the intervening step in which a court interprets and applies the rule on a case-by-case basis is effectively eliminated, Congress encroaches upon that power which has been reserved for the independent Judiciary." *Hadix*, 933 F.Supp. at 1366 (citing *United States v. Klein*, 80 U.S. 128 (1871)). DOMA states that same-sex marriages are not among those laws which must be given effect under the Full Faith and Credit Clause. 28 U.S.C. § 1738 (1997). This statement mandates the outcome of a case which would challenge DOMA under the Full Faith and Credit Clause. Adherence to the statutory language of DOMA would mean the Court's power to determine if a state's failure to recognize a same-sex marriage validly performed in another state violates the Full Faith and Credit Clause is removed. This is because DOMA, by its terms, states no violation of the Full Faith and Credit Clause exists. *Id.* For this reason alone, DOMA may well be unconstitutional.

244. The constitutional right of interstate travel is virtually unqualified. *United States v. Guest*, 383 U.S. 745, 757-58 (1966); see also *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55 (1974) (finding a one-year residency requirement for non-emergency medical care violated the Constitution); *Dunn v. Blumstein*, 405 U.S. 330, 338-342 (1972) (finding a state residency requirement of one year to vote unconstitutional); *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971) (judging constitutionality of "Ku Klux Klan Act," 42 U.S.C. § 1985(3)); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (finding a one-year residency requirement for qualification for and receipt of welfare benefits unconstitutional). State laws restricting the ability of citizens to invoke the protection of domestic relations laws also infringes upon the right to travel. *Sosna v. Iowa*, 419 U.S. 393, 419-20 (1975) (Marshall, J., dissenting) (stating that the Iowa one-year residency requirement needed to obtain a divorce is too restrictive, amounting to an unconstitutional denial to the right of interstate travel without a sufficiently important state interest). If DOMA were upheld, it would inhibit same-sex couples, who could marry in their domicile state, from moving to other states, because moving may result in the invalidation of their marriages. This result would constitute an unconstitutional limit on the right to interstate travel.

245. See discussion *infra* Part III.A.

246. See discussion *infra* Part III.B.

constitutional jurisprudence.<sup>247</sup> If DOMA is upheld as constitutional, Congress would have unbridled authority under Article IV to declare that the laws of a particular state need not be recognized solely due to a distaste for the laws of that particular state.<sup>248</sup> This Part provides a detailed analysis of the negative ramifications of DOMA.

### A. Denial of the Fundamental Right to Marry

Most important of the rights denied to same-sex couples by DOMA is the fundamental right to marry. The Supreme Court's pronouncements from *Maynard* to *Zablocki* make clear that the right to marry is a fundamental right guaranteed by the Constitution.<sup>249</sup> Like couples of opposite sexes, same-sex couples desire to partake of "one of the 'basic civil rights of man,'"<sup>250</sup> the fundamental right to marry.<sup>251</sup> DOMA fails to give effect to the Supreme Court's pronouncement that marriage is "essential to the orderly pursuit of happiness by free men."<sup>252</sup> Instead, DOMA recognizes marriage as essential only to the pursuit of happiness of opposite-sex couples, thereby ignoring the happiness of same-sex couples. DOMA fails to recognize that the fundamental importance of the right to marry is no less fundamental because the couple is of the same sex.

DOMA proponents argue that the Supreme Court pronouncements relating to marriage do not apply in the same-sex marriage context because the Court cases have always addressed marriages between a man and a woman.<sup>253</sup> However, the fact that same-sex couples desire to enter a union traditionally reserved by the laws of the states to a male-female union is not dispositive of the fundamental importance of marriage to all individuals. As the Hawaii Supreme Court recognized in *Baehr*, couples desire to enter a marital union for a variety of reasons: to have and raise children; to have a stable and committed relationship; for emotional closeness; for intimacy and monogamy; to establish a framework for a long-term relationship; for personal significance; for recognition by society; and to obtain certain legal and eco-

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247. See discussion *infra* Part III.C.

248. See discussion *infra* Part III.C.

249. See *supra* notes 135-52 and accompanying text.

250. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

251. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (holding that marriage is a fundamental right); *Loving*, 388 U.S. at 12 (same); *Skinner*, 316 U.S. at 541 (same).

252. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

253. See *supra* notes 135-52 and accompanying text.

conomic protections.<sup>254</sup> Thus, recognition of marriage, whether between a man and a woman, two women, or two men, is a matter of the utmost importance to the individuals.

While it is true that same-sex couples are not entirely denied the right to marry in that they are free to marry partners of the opposite sex, that is not dispositive of the inquiry of whether they are being denied the fundamental right to marry. In *Loving*, the Court rejected a similar contention by finding that denial of the right to marry partners of a different race violated the Constitution.<sup>255</sup> Similarly, in *Zablocki*, the Court found a constitutional violation where the petitioner was denied the right to marry a certain class of persons: persons unable to meet their child support obligations.<sup>256</sup> Denying citizens the right to marry a class of persons, same-sex partners, deprives the citizen of the fundamental right to marry just as the denial of the right to marry a class of persons—African-Americans in *Loving*, and persons delinquent on child-support payments in *Zablocki*—was held to be a constitutional violation. Because DOMA would deny same-sex couples the right to have their marriages recognized outside the state in which they were married, they would be denied the fundamental right to marry.

### B. *Loss of the Benefits Associated with Marriage*

In addition to being denied a right fundamental under our Constitution, to uphold DOMA would result in same-sex married couples losing a variety of benefits associated with marriage. First, at the federal level, same-sex couples are denied bankruptcy protection, burial rights, medical benefits, pension benefits, welfare benefits, government education loans, preferential tax treatment, and surviving spouse rights relating to veterans benefits, copyright protection, and social security benefits.<sup>257</sup> Additionally, marriage is often accompanied by tax advantages at both the state and federal level, including deductions, credits, rates, exemptions and estimates.<sup>258</sup> Third, the inheritance rights such as notice, protection, benefits, dower and curtesy are also affected by marital status.<sup>259</sup> Fourth, marital status determines a variety of health benefits, including insurance coverage, next-of-kin

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254. *Baehr v. Lewin*, 852 P.2d 44, 59 (1993), *remanded sub nom.*, *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

255. *Loving*, 388 U.S. at 3.

256. *Zablocki*, 434 U.S. at 384.

257. See *supra* notes 135-71 and accompanying text.

258. See *supra* notes 135-71 and accompanying text.

259. See *supra* notes 135-71 and accompanying text.

status, public assistance, and exemptions relating to state health departments.<sup>260</sup> Fifth, pre-marital agreements will not be upheld where the marriage is not recognized.<sup>261</sup> Sixth, without a valid marriage couples are not entitled to any post-divorce rights, including spousal support and property division.<sup>262</sup> Seventh, marital status is often a factor in child custody hearings even where the spouse is not the biological parent of the child in dispute.<sup>263</sup> Eighth, the ability to exempt real property from attachment or execution is dependent on marital status.<sup>264</sup> Ninth, invalidation of a couple's marriage would result in termination of their right to bring a wrongful-death suit since that right is only extended to surviving spouses, parents, children, and dependents.<sup>265</sup> Tenth, same-sex couples cannot achieve citizenship for their partners through marriage.<sup>266</sup> Finally, a number of private benefits are attached to marital status including insurance coverage on car rentals and announcements of marriages and engagements in newspapers.<sup>267</sup> The multitude of private and governmental benefits that attach to marriage make interstate recognition of same-sex marriages of paramount concern for those married couples.

### C. *The Constitutional Precedent Established by DOMA*

To uphold DOMA would leave the Court impotent to prevent future violations of the Full Faith and Credit Clause via congressional legislation, thereby rendering the Full Faith and Credit Clause without effect. A hypothetical revision of PKPA and DOMA illustrate the dangerous constitutional precedent that would be established if DOMA were upheld as a valid exercise of Congress's Article IV power.

The current PKPA states: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State."<sup>268</sup> Under current constitutional requirements, the states could not refuse to honor child support determinations without

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260. See *supra* notes 135-71 and accompanying text.

261. See *supra* notes 135-71 and accompanying text.

262. See *supra* notes 135-71 and accompanying text.

263. See *supra* notes 135-71 and accompanying text.

264. See *supra* notes 135-71 and accompanying text.

265. See *supra* notes 135-71 and accompanying text.

266. See *supra* notes 135-71 and accompanying text.

267. See *supra* notes 135-71 and accompanying text.

268. 28 U.S.C. § 1738A(a) (1994).

the existence of a strong public policy violation to justify the non-recognition.<sup>269</sup>

However, if the Court were to uphold DOMA, then the public policy rationale of *Pacific* could be easily bypassed by congressional legislation. Congress could, with its now enlarged Article IV power, modify PKPA to follow the language of DOMA. Imagine if PKPA did follow DOMA and merely read: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any child custody determination made by a court of another State." Under this fictional version of PKPA, a parent who was not granted custody in State A could simply take the child to State B for a new custody hearing. Indeed, this parent could go state to state until he or she was finally granted custody—forum shopping for the most beneficial custody determination. The Court would be bound by stare decisis established by the rejected challenge to DOMA, and, thus, would be unable to find a violation of the Full Faith and Credit Clause. Parents across the country would be left with no security regarding their child custody determinations absent non-obligatory comity by sister states.

Additionally, what if Congress revised DOMA to state that *no* marriages performed in one state need be recognized by other states? Again, due to the Court finding DOMA constitutional there would not need to be a finding of a public policy violation as required in *Pacific*. States could, under the revised DOMA, arbitrarily and capriciously refuse recognition to certain marriages without any violation of the Full Faith and Credit Clause. A bare desire to generate greater revenue for the state by requiring all married couples to re-marry in that State or even unfounded animus toward a particular union could motivate such a state decision. Married couples would be left without security that their marriages would be recognized in sister states. As noted by the Restatement, such a result would cause tremendous hardship on married couples and their children.<sup>270</sup>

The possible scenarios are numerous, but the point is clear: If Congressional action removing the requirements of the Full Faith and Credit Clause is sanctioned via DOMA, there is nothing left to stop Congress from removing Full Faith and Credit requirements in other

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269. See *supra* notes 76-134 and accompanying text.

270. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. h (1971). The Restatement notes "the hardship that might otherwise be visited upon the parties and their children" if marriages were not recognized as valid in sister states. *Id.* While same-sex couples are physically incapable of having a biological child, they are not prevented from having a child from artificial insemination or from adopting a child.

areas. And while the fictional versions of PKPA and DOMA are extreme examples, it is impossible to determine what scenarios will arise in the future or what public sentiment will pressure Congress to pass certain legislation. For the Court to sanction this Congressional exercise of power would, in effect, render the Court powerless to stop numerous constitutional violations. DOMA calls out for a revitalization of the Full Faith and Credit Clause; it calls out for the Supreme Court to assert its judicial authority to prevent an unwarranted and non-enumerated expansion in congressional power under Article IV.

#### IV. CONCLUSION

Congress's power to pass legislation under Article IV is subject to the mandates of the Full Faith and Credit Clause. Congress exceeded its delegated powers when it enacted DOMA because DOMA rescinds the operation of the Full Faith and Credit Clause in the arena of same-sex marriages. Not only is Congress's abrogation of the Full Faith and Credit Clause unauthorized by the text and history of that clause, but its passage of DOMA also fails to comport with the requirements imposed by the Supreme Court cases interpreting the clause. The requirements of the Full Faith and Credit Clause must be adhered to unless a procedural issue is involved or unless the recognition of the sister-state judgment would violate the public policy of the state. DOMA fails to invoke either exception to the requirements of the Full Faith and Credit Clause, and, instead, eliminates the operation of the clause altogether. To uphold DOMA would give constitutional authority to a congressional exercise of power that is aimed at avoiding the requirements of the Full Faith and Credit Clause.

The negative ramifications ensuing from DOMA warrant a finding that DOMA is unconstitutional. DOMA denies same-sex couples the fundamental right to marry, thereby preventing same-sex couples from taking advantage of the numerous benefits associated with the marital relationship. Additionally, a dangerous constitutional precedent is established through DOMA because Congress passed DOMA to authorize the states to ignore the valid act of a sister state based solely on a dislike for that state's laws. To uphold DOMA would undermine century-old Court mandates that establish that the Full Faith and Credit Clause must be adhered to in interstate recognition of records, acts, and judicial proceedings. While states may disagree with same-sex marriages, recognition is required under the Full Faith and Credit Clause as the price of our federal system of government. In defense of the Full Faith and Credit Clause of the Constitution, the Defense of Marriage Act should be declared unconstitutional.

